Supreme Court, U. S.
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74-1044
No.....

In The Supreme Court of The United States
OCTOBER TERM, 1974

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

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ROBERT D. MURGIA,

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ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

JURISDICTIONAL STATEMENT

The Attorney General of the Commonwealth of Massachusetts, on behalf of the Members and Executive Secretary of the Board of Retirement and the Commissioner of Public

Safety, submits this statement pursuant to Rule 13 of the Rules of this Court in support of his contention that this Court has jurisdiction to review the order of the district court of three judges and that the question presented is substantial.

OPINIONS BELOW

The opinion of the district court dated July 26, 1972 is reported at 345 F. Supp. 1140. The memorandum of the court of appeals is not reported. The opinion of the district court of three judges dated May 31, 1974 is reported at 376 F. Supp. 753. The opinion of the district court of three judges dated December 12, 1974 is not yet reported. The opinions, judgment and order of the district court and the memorandum and order of the court of appeals are reproduced as an appendix to this statement.

JURISDICTION

This civil action was commenced in the United States District Court for the District of Massachusetts under the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1970). Jurisdiction was asserted under 28 U.S.C., § 1343 (1970), and declaratory and injunctive relief were sought under 28 U.S.C., §§ 2201 and 2202 (1970). Because the complaint requested an injunction against the operation of a state statute on the grounds of its unconstitutionality, a request for the convening of a three-judge court was made. After hearing, a district judge denied the request and dismissed the complaint in a judgment entered on July 26, 1972. The plaintiff then appealed to the United States Court of Appeals for the First Circuit, which court reversed the judgment of the district court and remanded the matter to the district court for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (1970).

After hearing, the three-judge court issued an opinion on May 31, 1974 which stated that Mass. Gen. Laws ch. 32, § 26(3) (1973) was unconstitutional. The awarding of relief was deferred until further hearing. After such further hearing was held, the court issued an opinion on December 12, 1974 with respect to the form of relief. Also on December 12, 1974 the court entered an order enjoining the defendants from enforcing Mass. Gen. Laws ch. 32, § 26(3) (1973). Said order stated that it would be stayed pending appeal provided that a notice of appeal was filed within thirty days. The defendants filed a notice of appeal in the district court on December 23, 1974.

The statutory provision which confers on this Court jurisdiction of the appeal is 28 U.S.C. § 1253 (1970). Cases which sustain jurisdiction are: *Gonzalez* v. *Automatic Employees Credit Union*, 43 U.S.L.W. 4025 (U.S. Dec. 10, 1974); *Allen* v. *State Bd. of Elections*, 393 U.S. 544 (1969); *Anderson* v. *Martin*, 375 U.S. 399 (1964); *Paul* v. *United States*, 371 U.S. 245 (1963); *United States* v. *Georgia Pub. Serv. Comm'n.*, 371 U.S. 285 (1963).

The validity of Mass. Gen. Laws ch. 32, § 26(3) (1973) is involved. Said statute provides, in pertinent part:

> "Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs."

The text of the pertinent portion of the statute is found at page 182 of the second volume of the Annotated Laws of Massachusetts (The Michie Company, 1973).

QUESTION PRESENTED

Whether the Massachusetts statute mandating the retirement of a state police officer upon reaching the age of fifty is constitutional?

STATEMENT OF THE CASE

On July 7, 1972, the plaintiff, Robert D. Murgia, commenced a civil action in the United States District Court for the District of Massachusetts seeking an injunction against the operation of Mass. Gen. Laws ch. 32, § 26(3) (1973). Having served for at least twenty years in the Uniformed Branch of the Massachusetts State Police (state police), the plaintiff was to be mandatorily retired upon reaching the age of fifty. After hearing on a motion for a temporary restraining order and a request for the convening of a three-judge court, the district judge dismissed the complaint for failure to raise a substantial constitutional question. The plaintiff then appealed to the United States Court of Appeals for the First Circuit, which court reversed the judgment of the district court and remanded the matter to the district court for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (1970).

A three-judge court was convened and evidence taken by way of the submission of depositions, affidavits and various documentary materials. The three-judge court found that service in the state police "is, or can be, arduous and that high versatility is required, with few, if any, backwaters available for the partially superannuated," and "that there

is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." (App. 23-25).

The court also found that the plaintiff was in excellent physical condition and that medical examinations were given yearly after state police officers reached the age of forty. By way of observation, the court noted that no study had been conducted on whether a critical area is reached at age fifty irrespective of medical testing. On this record the court ruled that the statute mandating the retirement of state police officers at age fifty lacked a rational basis in furthering a substantial state interest. After a further hearing on the nature of the relief to be granted, the court entered an order enjoining the defendants, the Board of Retirement and the Commissioner of Public Safety, from enforcing Mass. Gen. Laws ch. 32, § 26(3) (1973) against the plaintiff. The instant appeal followed.

THE QUESTION IS SUBSTANTIAL

The holding of the court below—that the mandatory retirement of state police officers at the age of fifty contravenes the constitution of the United States—presents a substantial question requiring plenary consideration by this Court. The district court's ruling that Mass. Gen. Laws ch. 32, § 26(3) (1973) lacks a rational basis ignores essential governmental interests furthered by the statute and generates grave uncertainty as to the administration of the state police and its retirement system.

The district court purported to apply the rational basis test in ascertaining whether the retirement statute violated the Equal Protection Clause. Had the court actually ad-

hered to that test, the statute would surely have survived the constitutional challenge. "A century of Supreme Court adjudication under the Equal Protection Clause affirmatively supports the application of the traditional standard of review, which requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." *San Antonio Independent School District* v. *Rodriquez,* 411 U.S. 1, 40 (1973).

The purpose of the state police is "to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth." Mass. Gen. Laws ch. 22, §§ 9, 9A (1973). The legitimacy of this state purpose is patent and obvious. "[T]he obligation of the government to protect life, liberty and property against the conduct of the indifferent, the careless and the evil-minded may be regarded as lying at the very foundation of the social compact." *Chicago* v. *Sturges,* 222 U.S. 313, 322 (1911).

The mandatory retirement of state police officers at the age of fifty is rationally related to the public safety objectives of the state police. The district court found that service was arduous and that "there is a general relationship between advancing age and decreasing physical ability to do the job." (App. 25). The inescapable conclusion is that the mandatory retirement statute is directly related to promoting the physical capability of the state police to perform its arduous police functions. *See McIvaine* v. *Pennsylvania,* 6 Pa. Cmwlth. 505, 296 A.2d 630 (1972), *aff'd,* 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed,* 415 U.S. 986 (1974) (Pennsylvania statute mandating resignation of state police officers who attain the age of sixty upheld).

Without citation of authority, the district court redefined the concept of rationality in the context of the state police. Essentially, the court ruled that since individual medical examinations were given to officers over forty years of age on an annual basis, the burden was on the defendants to show that the prognosis based on such testing was unreliable. Such an analysis not only blurs the very real and distinct objectives of the retirement statute and the medical testing; it also erroneously interjects a concern with individual determinations into the rational basis test.

The medical examinations are designed to determine whether a state police officer has a physical defect which would warrant his retirement for disability. This determination relates to the maintenance of a minimal level of capability; it does not relate to the functional age or the relative physical capability of a particular officer. *Cf. Hodgson* v. *Greyhound Lines, Inc.,* 499 F.2d 859, 864 (7th Cir. 1974), *cert. denied,* 43 U.S.L.W. 3404 (U.S. Jan. 20, 1975). The retirement statute, Mass. Gen. Laws ch. 32, § 26(3) (1973), has the positive objective of promoting the physical capability of the state police. Intersecting the lines of increasing age and decreasing physical capability at age fifty is a rational accommodation well within the legislative power to make. The fact that a particular officer over the age of fifty may maintain a minimal or even a high level of capability is irrelevant for purposes of equal protection scrutiny. "But every line drawn by a legislature leaves some out that may well have been included. That exercise of discretion, however, is a legislative, not a judicial function." *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 8 (1974) (footnote omitted).

Increasing the distance between the traditional rational

basis test and the analysis initiated by erroneously focusing on the availability of medical screening, the district court required the defendants to document that by age fifty a critical area had been reached irrespective of the medical examinations. Even if the Equal Protection Clause were construed to limit the state police to merely eliminating the physically unfit, such a requirement misconceives the burden of proof. The plaintiff must establish the lack of a factual basis for the statute and, if the issue is whether a critical area is reached at age fifty, the plaintiff must prove that such an area is not reached. The defendant should not be held to proving the affirmative. *McGowan* v. *Maryland*, 366 U.S. 420 (1961). While the district court did review various statistics concerning disability retirements for non-injury defects and waivers of such defects, the only conclusion reached was that they do not forecast imminent change at age fifty. The court did not find that they established that a critical area was not actually reached at age fifty.

The district court's singular constitutional analysis may be described as an equal protection one with considerable due process overtones. Indicative of this fault is the court's statement that the mandatory retirement statute was no more rational than the mandatory suspension or discharge rules invalidated in *Cleveland Bd. of Education* v. *LaFleur*, 414 U.S. 632 (1974). In *LaFleur*, this Court ruled that a school teacher could not be suspended or discharged merely because of reaching the fourth or fifth month of pregnancy. Because the rules in question affected the exercise of the fundamental constitutional right of procreation and operated as irrebuttable presumptions of unfitness to perform teaching functions, this Court ruled that they violated the Due Process Clause.

The retirement of state police officers and the discharge

of pregnant school teachers present very distinct considerations. There is a finding in this case that physical ability to perform the functions of a police officer declines with age; there was no finding in *LaFleur* that physical ability to teach declines in the fourth or fifth month of pregnancy. The retirement statute does not conclusively presume that a police officer is physically unfit for service; it maximizes the physical capability of the force as a whole. The maternity rules conclusively presumed that a teacher was physically unfit for teaching; they did not serve to promote any definable positive state interest in the education process. The distinctions between state police officers and pregnant teachers in these cases are thus significant and eminently reasonable.

The mandatory retirement statute serves the additional state interest of promoting morale and incentive in the service. The shorter the average term of service, the more promotions that become available. Increasing the retirement age and thereby the length of the average term of service would result in at least a degree of "stagnation of promotion and disincentive to . . . service." *Schlesinger* v. *Ballard*, 43 U.S.L.W. 4158, 4160 (U.S. Jan. 15, 1975).

While the attractiveness of increased promotion opportunities may be counteracted with a certain degree of regret upon being faced with early retirement, it does not lose its rationality thereby. Since retirement benefits are related to salary level when retired, the benefits are greater for those who have been promoted to higher ranks. Mass. Gen. Laws ch. 32, § 26(3) (1973). The ultimate unhappiness upon retirement thus would not materially affect the force as a whole and is tempered by the receipt of retirement benefits.

Finally, the decision of the district court contains no citation of authority supporting its views and ignores considerable authority to the contrary. Each case concerning age classifications referred to by the district court sustained the challenged classification. *Oregon* v. *Mitchell,* 400 U.S. 112 (1970) (voting); *Thomas* v. *Pate,* 493 F.2d 151 (7th Cir. 1974) (warm clothing for inmates); *United States* v. *Duncan,* 456 F.2d 1401 (9th Cir. 1972), *vacated on other grounds,* 409 U.S. 814 (1972) (jury service); *Smith* v. *United States,* 424 F.2d 267 (9th Cir. 1970) (selective service); *Scarangella* v. *Commissioner,* 418 F.2d 228 (3rd Cir. 1969) (tax exemptions for dependents); *Air Line Pilots Ass'n., Int'l.* v. *Quesada,* 276 F.2d 892 (2nd Cir. 1960), *cert. denied,* 366 U.S. 962 (1961) (active duty for pilots). Not cited by the court, but upholding age requirements for retirement or employment are: *McIlvaine* v. *Pennsylvania, supra,* (state police); *Weisbrod* v. *Lynn,* Civil No. 2465-72 (D.C. Oct. 11, 1974) (federal civil service); *Weiss* v. *Walsh,* 324 F. Supp. 75 (S.D. N.Y. 1971), *aff'd,* 461 F.2d 846 (2nd Cir. 1972), *cert. denied,* 409 U.S. 1129 (1973) (college professor); *Armstrong* v. *Howell,* 371 F. Supp. 48 (D. Neb. 1974) (county employees); *Retail Clerks Union, Local 770* v. *Retail Clerks Int'l. Ass'n.,* 359 F. Supp. 1285 (C.D. Cal. 1973) (union members). The district court opinion is therefore devoid of support in either reason or precedent.

CONCLUSION

The question presented by this appeal is substantial and warrants plenary consideration by the Court. Probable jurisdiction should therefore be noted and the case set down for argument.

Respectfully submitted,

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT D. MURGIA, Plaintiff	CIVIL ACTION No.72-2083-LC
v.	
COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT	
Defendant	

MEMORANDUM AND ORDER

CAMPBELL, D.J.

I.

Plaintiff is the executive officer and lieutenant colonel of the Uniformed Branch of the Massachusetts State Police, with over 24 years service in that branch. On July 23, 1972, when he reaches the age of 50, he will be retired from the state police, pursuant to M.G.L. ch. 32, sec. 26(3)(a), which requires that the state board of retirement retire members of the Uniformed Branch when they reach 50 or complete 20 years service, whichever occurs later.

Plaintiff brings this action, asserting jurisdiction under 28 U.S.C.§1343(3), to enjoin the execution of ch. 32, §26(3)(a). He alleges that the statute discriminates against him in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Plaintiff claims that he is denied equal protection of a right to employment, in at least three ways:

"(a) Men have been employed by the State Police, taken a leave of absence of many years, and returned to the force and continued their employment up to age 65 because they have not completed their 20 years service.

(b) Detectives in the State Police who perform similar functions as the uniformed branch are permitted to continue in their employment under General Laws, Chapter 26(3) to the age of 65.

(c) Women in the State Police by virtue of an exception in General Laws, Chapter 22, Section 9A are permitted to continue their employment beyond the age of 50."
Complaint ¶7.

The immediate questions before this Court are whether or not to convene a three-judge court pursuant to 28 U.S.C. Secs. 2281 and 2284, and issue a preliminary injunction restraining plaintiff's forced retirement pending final determination of the case. A hearing addressed to these questions was held on July 18, 1972. There, in addition to the arguments of counsel, the Court heard plaintiff present case-history examples and other evidence to illustrate the alleged discriminations described above. The Court also allowed a brief amicus statement to be made, opposing plaintiff's contentions, by counsel for the State Police Association of Massachusetts.

II

A three-judge court is not required to be convened if the constitutional question raised is insubstantial. Ex Parte Poresky, 290 U.S. 30 (1933). There the Court said:

"The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint....The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy'." 290 U.S. at 32.

More recently, the Supreme Court has reiterated that the question of substantiality is for the single judge to decide:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." Idlewild Bon Voyage Liquor Corp. v. Epstein, 370 U.S. 713, 715 (1962). See also Bailey v. Patterson, 369 U.S. 31 (1962), Swift & Co. v. Wickham, 382 U.S. 111 (1965).

In deciding whether or not the constitutional question presented here is substantial, this Court feels that it should be guided by the following language of the Second Circuit Court of Appeals:

> "The easiest solution for the district judge, whenever the words 'United States Constitution' or "Fourteenth Amendment' appear in a complaint, would be to relieve himself of two-thirds of the responsibility for the decision by requesting the convening of a three-judge court...[But a] district judge should not feel that he is merely a rubber stamp or that he exercises his judgment at his peril...[A]lthough this case may not be 'open and shut' (so few cases are), the decisions of the Supreme Court and other courts which are as analogous as possible to this case should be examined to ascertain whether they 'foreclose the subject'... Of course, no two cases involving equal protection are alike as to facts and, were mere factual variation the test, all cases should be channeled to the Supreme Court on the chance that some distinguishing feature might be found. However, the Supreme Court reminds us that '[t]he Three-judge requirement is a technical one to be narrowly construed. Phillips v. United States 312 U.S. 246, 251...." Johnson v. New York State Education Department, 449 F. 2d 871, 875-6 (2nd Cir.1971). Compare Jackson v. Choate, 404 F. 2d 910, 913 (5th Cir.1968).

III

Upon examination of analogous Supreme Court and lower court cases, I conclude that plaintiff's federal constitutional claim is without merit.

This is not a case where a plaintiff is alleging discrimination based upon a suspect classification such as religion or race, or deprivation of some fundamental right such as the right to vote. Statutory classifications of such a nature are subject to special scrutiny by the courts. Brown v. Board of Education, 347 U.S. 483 (1954), Harper v. Virginia Board of Elections, 383 U.S. 663 (1966).

The plaintiff has pointed to no case bringing the right sought to be protected here, the right to continued employment beyond a specified age or period of service, within the area where only a compelling interest allows the state to maintain the challenged classification. Indeed, one case plaintiff relies on did not even consider the constitutional question, Allen v. Borough of West Mifflin, 419 Pa. 394, 214 A. 2nd 502 (1965), and the other held against the officers complaining of forced retirement, Boyle v. City of Philadelphia, 338 Pa. 129, 12 A. 2d 43 (1940).

Absent any allegations touching off strict scrutiny of the challenged classification, the task before the court is to determine whether the "classification bear[s] some rational relationship to a legitimate state purpose." Weber v. Aetna Casualty & Surety Company, Supreme Court Slip Opinion, April 24, 1972, at 8, and cases cited therein.

The Supreme Court has applied this test where classifications depriving persons of employment opportunities are challenged. Hotch v. Board of River Port Pilot Comm'rs, 330 U.S. 552 (1947), Goesaert v. Cleary, 335 U.S. 464 (1948).

According to counsel for the Commonwealth, the purpose of the challenged statute is to insure that the Uniformed Branch of the state police be a "young, vigorous force." Early retirement even of high-ranking officers gives younger men a chance for promotion and ensures that commanders possess the physical vigor to accompany their men in the field. These are surely legitimate purposes. Mandatory retirement at the age of 50 is at least a rational, if not the only, means of achieving them.

True, the statute provides that a state policeman may not be retired until he has reached 20 years' service if that should occur after he has reached 50. The Commonwealth explains that this provision merely tempers the age-50 requirement in the interest of having a policeman serve long enough to merit a pension.

Under usual circumstances, a man will be forced to retire at age 50 in any event, since he may enlist in the state police for the first time only between the ages of 21 and 29. M.G.L. ch. 22, §9a, effective Dec. 1, 1939. But it has happened, for various reasons, that some members have exceeded or will exceed age 50 when they retire. Thus, before the effective date of §9a, some men over 29 enlisted. Others, by special statutory

dispensation, were allowed to enlist after they had reached 30 if they had served in the armed forces during World War II. Ch. 22, §9a, as amended by the Acts of 1946, ch. 260.

A notarized letter by the Commissioner of Public Safety, made an appendix to this opinion, shows that most uniformed policemen over 50 at retirement are in the above two categories. The case histories produced by the plaintiff's own search do not contradict this conclusion.

Finally, in some instances, members have left and then returned to the service, and hence are over 50 before putting in 20 years total service. But as the Commissioner's notarized letter makes clear, relatively few men are in this category: Only two men presently in the service, and two men who have retired.

Only to the limited extent illustrated by the examples given above is the principal statutory purpose thwarted. The Commissioner states that since 1921 only 35 out of 2,061 individuals enlisted in the Uniformed Branch served over the age of 50.

As for the differences between the treatment of the plaintiff and the treatment of detectives and women, it is surely rational to differentiate between those whose jobs require primarily patrolling, and crime prevention and control, and those whose duties require less athletic and physically demanding work. Detectives, whose primary task is investigation, and women, whose primary task is

dealing with women and children, could rationally be determined by the legislature to fall within this latter category.

That detectives and women sometimes perform physically taxing work does not, because it produces a minor inconsistency in the statutory scheme, make the statute constitutionally invalid.

It is also true that uniformed members assigned to the detective branch, or to other offices where physically demanding work is not required, are still forced to retire at 50.

This and other inconsistencies in the statutory scheme may be imperfections. But, as the Supreme Court has said:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'....The problems of government are practical ones and may justify, if they do not require, rough accommodations--illogical, it may be, and unscientific'....'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.'" Dandridge v. Williams 397 U.S. 471, 485 (1970). See also Briggs v. Kerrigan, 431 F. 2d 967, 968-9 (1st Cir.1970).

Plaintiff's prayers for a temporary restraining order and for the convening of a three-judge court are denied. As the complaint does not raise a substantial constitutional question, and as it is essential to jurisdiction

that a substantial constitutional question be raised, the complaint is dismissed. Ex Parte Poresky, 290 U.S. 30 (1933), Rosado v. Wyman, 397 U.S. 397 (1970).

Levi H. Campbell
United States District Judge

Date: July 21, 1972

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

ROBERT D. MURGIA

vs. CIVIL ACTION

No. 72-2083-LC

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT

JUDGMENT

July 26, 1972

CAMPBELL, District Judge,

After hearing, and in accordance with the Memorandum and Order of the Court entered July 21, 1972, it is hereby

ORDERED

Judgment for the defendant;

complaint dismissed.

By the Court,

Susan A. Tebo
Deputy Clerk

Leon N. Campbell
United States District Judge

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1300.

ROBERT D. MURGIA,
Plaintiff, Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
BOARD OF RETIREMENT,
Defendant, Appellee.

U.S. COURT OF APPEALS
Filed in Clerk's Office
SEP 10 1973
FOR THE FIRST CIRCUIT

Before COFFIN, Chief Judge,
McENTEE, Circuit Judge,
and KILKENNY, Senior Circuit Judge

MEMORANDUM AND ORDER

Entered: September 10, 1973

The court, mindful of the strictures of Goosby v. Osser, 409 U.S. 512 (1972) and of the ambiguities in Frontiero v. Richardson ___U.S.___ (May 14, 1973), both decided subsequently to the decision below, is unable to say that the claims presented afford "no room" for controversy. It is ordered that the judgment be set aside and the case is remanded for the impanelling of a three-judge court. No costs.

By the Court:

Dana H. Gallup
Clerk.

Entered: Coffin, Ch. J.

[cc: Messrs. City and O'Malley.]

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ROBERT D. MURGIA, Plaintiff, v. COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT et al., Defendants.	)	Civil Action No. 72-2083-T

O P I N I O N

Before Aldrich, Senior Circuit Judge, Freedman and Tauro, District Judges.

May 31, 1974

ALDRICH, Senior Circuit Judge. Plaintiff, Robert D. Murgia, brings this three-judge district court action to declare unconstitutional, and to obtain injunctive relief against the enforcement of, Mass. G.L. c. 32 § 26(3). Pursuant to that statute plaintiff, a Lt. Colonel in the Uniformed Branch of the Massachusetts State Police, was involuntarily retired because, having completed over 20 years of service, he had reached age 50. He alleges that mandatory retirement at that age is a violation of his civil rights of due process and equal protection. He also alleges sex discrimination because under the law, although apparently not now in practice, women police officers may enlist after age 30, and thus automatically may serve beyond age 50.[1] We reach only one

1. Had plaintiff not served 20 years, he could have remained on the force until he did so. However, since under the law no male may enlist after age 30, this extension can presently occur only for certain individuals who have resigned, or taken a leave of absence, and rejoined at some later date. On

issue, that a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest.

Until age 40 every officer is given a comprehensive physical examination every two years, and after age 40, every year. Failure to pass results in disability retirement unless the particular physical defect is waived by the Commissioner of Public Safety.[2] Plaintiff's standing is self-evident; the testimony is undisputed that at the time of his discharge he was in excellent physical health and capable of performing the duties of a state police officer, whether involving physical or psychological stress. At the same time, it is acknowledged that service in this branch is, or can be, arduous,[3] and that high versatility is required, with few, if any, backwaters available for the partially superannuated. Lest there be misunderstanding, we do not fault the service in

the record this is an unusual occurrence, and we will assume the existence of legitimate grounds for the exception. Nor will we concern ourselves with the technical sex discrimination.

2. Senior officer of the Uniformed Branch, and head of the Department of Public Safety, of which the State Police is a division.

3. We assume, at least for present purposes, that the duties are sufficiently more arduous than, or the physical and mental stresses significantly different from, those of detectives or policemen in other branches and at other levels of government, so that there is no viable unequal protection claim in this area.

this respect; the state is entitled to maintain rigorous job requirements; nor do we understand plaintiff to contend otherwise.

Our first question could be the standard to apply in testing the constitutionality of the statute; whether, because plaintiff's right to employment may be a fundamental interest or because age might be a suspect classification, the burden is on the state to show a compelling interest, or whether, on the other hand, the burden is on the plaintiff to show a lack of rational basis. However, since we find that plaintiff has succeeded in this last, we need not proceed further. We hold that plaintiff has at least a recognizable interest in retaining his employment[4] which the state cannot deny arbitrarily and irrationally, Drown v. Portsmouth School District, 1 Cir., 1971, 451 F.2d 1106, 1108; see Board of Regents v. Roth, 1972, 408 U.S. 564, 576-77; Wieman v. Updegraff, 1952, 344 U.S. 183, 192, and we find that mandatory retirement of officers at 50 years of age bears no "fair and substantial relation to the object of the legislation," F.S. Royster Guano Co. v. Virginia, 1920, 253 U.S. 412, 415, quoted in Reed v. Reed, 1971, 404 U.S. 71, 76.

We dispose readily of certain of the state's contentions. Its argument that early retirement enhances the morale of the younger members, in a sense assumes the point. Of course, if there are only younger members, they are happier than the older members who are being eliminated. This does not add up on balance, but merely advances the time

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4. To the extent that it may affect plaintiff's due process rights, see Board of Regents v. Roth, 1972, 408 U.S. 564. we note that after six years of service no officer who passes the physical can be denied reenlistment. Mass. G.L. c. 22, § 9A.

of ultimate unhappiness.[5] The same can be said with respect to the alleged desirability of rapid promotion; the attractiveness of quick promotion must be weighed against the unattractiveness of early retirement. Furthermore, to the extent that the purpose of early retirement is said to be to empty higher ranking positions after they have been occupied by one person for a reasonable time, the cut-off at 50 years is of questionable consequence since it is unrelated to the period of time the retiree has occupied his last position.[6] The alleged desirability of facilitating rapid promotion by early retirement, rather than a justification, will be seen on analysis to be age discrimination per se.

The only question requiring serious consideration is whether mandatory retirement at age 50 is rationally related to maintaining a vigorous, healthy personnel. Even plaintiff's experts concede that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job. On the other hand, the state does not dispute their testimony that the relation between chronological age and functional age varies greatly from one individual to the next. Its response is that in matters of this sort it is administratively reasonable to select an arbitrary cut-off, and that irrationality is not established by the fact that certain individuals are disadvantaged thereby. Cf. Wickard v. Filburn, 1942, 317 U.S. 111, 129-30.

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5. We would concede vitality to the morale argument if officers not capable of carrying their full load were to be retained, but this is not the question. See ante.

6. An officer qualifying for promotion, or for further promotion, is not required to accept it.

We fully accept the necessity of choosing arbitrary standards in certain, and indeed in many, situations. For example, in dealing with the immeasurable changes relating to the onset of maturity, legislatures may require a specific age for voting, Oregon v. Mitchell, 1970, 400 U.S. 112, even though the particular age selected may seem indifferentiable from other ages in proximity to it. Id. at 294 (Stewart, J., concurring in part and dissenting in part); see id. at 243-46 (Brennan, White and Marshall, JJ., concurring in part and dissenting in part). See also, e.g., United States v. Duncan, 9 Cir., 1972, 456 F.2d 1401, 1405 (minimum age for jury service), vacated on other grounds, 409 U.S. 814; Smith v. United States, 9 Cir., 1970, 424 F.2d 267 (selective service age limitations); Scarangella v. Commissioner, 3 Cir., 1969, 418 F.2d 228 (classification of tax exemptions by age of dependent). But to say that a line may be drawn arbitrarily when there is no readily discernible breaking, or turning, point, does not mean that the line can be drawn anywhere at all. To satisfy minimal standards of rationality the line must be drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is prefereable to any other.

In the voting and other cases above cited, the legislature was concerned with a broad spectrum of the population where it would not be practicable to make individual determinations. Under such circumstances an arbitrary standard is called for, if not inevitable, and the only question must be whether the one selected is, in the large, reasonable. In the case at bar the situation is exactly the reverse. Individual testing is not impracticable but, rather, is already the order of the day. There is no

suggestion that it is more budrensome to examine an officer at age 50 than it was at age 49. We must look, therefore, in another direction for reasonableness -- is there, for example, a greater risk at the higher age that the test, or, more exactly, the prognosis based upon testing, will be less reliable?

In this connection we note the case of Air Line Pilots Ass'n, Int'l v. Quesada, 2 Cir., 1960, 276 F.2d 892, cert. denied 366 U.S. 962, upholding as not "arbitrary and discriminatory and without relation to any requirement of safety" an administrative ruling disqualifying pilots from active duty upon reaching age 60. In so doing the court pointed out the comprehensive study conducted by the administrator, and the documented reasons for his conclusion that by age 60, in spite of medical testing, a critical area had been reached. See 276 F.2d at 898. No such determination has been, or could be made, in the case at bar. So far as appears, no study has been conducted of any kind. While there has been a compilation of certain statistics, from defendants' standpoint they are counter-productive. Not only did no expert testify to any significance in age 50 in a group which, by hypothesis, had individually passed annual tests during the preceding decade, but statistics of actual experience forecast no imminent change. In the Uniformed Branch during the period November 1967 to December 1973 there were fifteen discharges of persons between the ages of 40 and 50 for non-injury disability, divided as follows.

Age 40-3	Age 45-1
41-3	46-3
42-1	47-2
43-1	48-1
44-0	49-0
8	7

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The force of these figures is not offset by a growth curve of waivers in the place of disability retirements.[7] The statistics furnish no reason to suppose that age 50 is within, or even significantly approaching, a range where changes of conditions warrant a change of treatment. Rather, they contradict it.

If, further, we turn from Massachusetts to national experience as disclosed by legislative response, plaintiff has furnished a list of statutes from which it appears that Massachusetts is the only state compulsorily retiring police officers before age 55.

On this record we find that mandatory retirement at age 50, where individualized medical screening is not only available but already required, is no more rational, and no more related to a protectable state interest, than the mandatory suspension or discharge of school teachers upon reaching their fourth or fifth month of pregnancy.[8] Cleveland Board of Education v. LaFleur, (1/21/74) U.S. .

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7. Thus in the year 1973, ten waivers of partial, although permanent, non-injury disability were granted in the 40-50 age group. These divided as follows.

Age 40-0	Age 45-2
41-2	46-0
42-1	47-0
43-1	48-2
44-2	49-0
6	4

8. We do not regard Thomas v. Pate, 7 Cir., 1974, 493 F.2d 151 (prisoners under 40 denied free long underwear) as in any way contra. We read that case, inter alia, as one where plaintiff failed to make allegations specific enough to raise an issue of irrationality.

Recognizing the public interest in protecting individuals' right to work, and against discrimination on account of age, see, e.g., Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621; Mass. G.L. c. 149, §§ 24A and 151B, we are compelled to strike down the present age distinction where plaintiff has established the absence of any factual basis therefor.[9]

Judgment will be entered declaring Mass. G.L. c. 32 § 26(3) unconstitutional and void, and awarding, after hearing, appropriate mandatory relief.

Bailey Aldrich
U.S. Senior Circuit Judge

Frank H. Freedman
U.S. District Judge

Joe F. Tauro
U.S. District Judge

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9. Whether we would reach the same result if the statute selected a more customary retirement age is not before us. With great respect to Mr. Justice Rehnquist, dissenting in Cleveland Board of Education v. LaFleur, ante, we would anticipate the question of mandatory retirement at age 70 not to be the same as at age 50, but perhaps we say this because of the increasing difficulties that a plaintiff might have to show that at that greater age the state had not made out a factually rational argument.

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ROBERT D. MURGIA,

Plaintiff,

v.

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT et al.,

Defendants.

Civil Action No. 72-2083-T

OPINION

December 12 1974.

Before ALDRICH, Circuit Judge,

TAURO and FREEDMAN, District Judges.

ALDRICH, Senior Circuit Judge. We are now concerned with the measure of relief to be afforded as a result of our decision in Murgia v. Commonwealth of Massachusetts Board of Retirement, D.Mass., 1974, 376 F.Supp 753, holding unconstitutional Mass. G.L. c. 32, § 26(3), which required the involuntary discharge of plaintiff Murgia from the State Police force, although he was physically qualified, simply because he had reached age 50. The first question is whether all issues now presented are properly subject to resolution by three judges, or whether some are for the single judge alone. The parties have sought the former course, and since all three judges are in agreement on the merits, we see no basis for complaint here whether our decision to sit jointly is legally correct or not.[1]

1. We recognize, of course, that jurisdiction cannot be conferred by consent or waiver. Americans United for Separation of Church and State v. Paire, 1 Cir., 1973, 475 F.2d 462, 464. Given our unanimity, however, the question of three judges does not affect the outcome, and will come into focus only in case of an appeal, viz., whether it should lie wholly to the Supreme Court, or to the Court of Appeals as well on the issue of relief here considered. See Socialist Workers Party v. Rockefeller, S.D.N.Y., 1970, 314 F.Supp. 984, 996-97, aff'd, 400 U.S. 806, appeal dismissed, 400 U.S. 962; Swift & Co. v. Wickham, S.D.N.Y., 1964, 230 F.Supp. 398, aff'd, 2 Cir., 364 F.2d 241, cert. denied, 385 U.S. 1036. The question of relief at issue seems sufficiently bound up with the equitable remedy sought by plaintiff to be appropriate for consideration by three judges. See Baltimore & Ohio R.R. Co. v. United States, 1929, 279 U.S. 781, 785; Department of Employment v. United States, 385 U.S. 355, 357, aff'g 263 F.Supp. 581. At the least, the decision to retain three-judge jurisdiction may be within our discretion, see Jenkins v. McKeithen, E.D.La., 1968, 286 F.Supp. 537, 542, rev'd on other grounds, 395 U.S. 411, and, if so, we exercise that discretion in favor of retention.

A few comments are in order with respect to what we are not including in our judgment. Plaintiff asks that we require that his reappointment be to the position of Deputy Superintendent, a position recently created by the Massachusetts legislature, possibly on account of our earlier decision. We decline to do so. Plaintiff was retired with the rank of Lt. Colonel, and it is to this position that he should be restored. The fact that there was only one officer with a higher rank at the time of his dismissal does nt guarantee that if he had not been dismissed he would have been entitled to the new superior position. In any event, we do not propose to organize the State Police. If, by some seemingly remote possibility plaintiff hereafter is able to show, in connection with his reinstatement, discrimination amounting to a failure fully to comply with our judgment, that would be another matter.

Next, plaintiff asks us to include an order for back pay, which he describes as "restitution of compensation withheld." The parties, inter sese, have made various calculations and adjustments, and have stipulated to the amount, but defendants, citing the Eleventh Amendment, and Edelman v. Jordan, 1974, 415 U.S. 651, contest our right to make any award.

In Edelman the Court affirmed a judgment declaring unconstitutional certain state practices barring plaintiffs from receiving welfare benefits, but reversed a money judgment awarding retroactive benefits of which plaintiffs had been deprived. The Court held that although such payment was denominated equitable restitution and in substance might be so considered, this did not serve to avoid the Eleventh Amendment's strictures. Plaintiff's attempted distinctions are not persuasive. First, plaintiff says that his discharge was after the institution of the action, so that there would be no retroactive effect on the state treasury because the state was on notice when it failed to keep the money. This argument proves too much. If defendants retained plaintiff in his position they would have violated the statute, as yet not held unconstitutional. If they discharged him they could not retain the funds, because they had to hire a replacement.

Next, plaintiff argues that since the mount of the payment here is not substantial, perhaps defendants will, or should pay it in their individual capacities. They support this contention with the claim that defendants' action was not "simple good faith application of the provisions of the statute" because they knew of the pendency of the action. Our previous answer applies here, if anything more strongly. Cf.

Class v. Norton, 2 Cir., 10/10/74, F.2d . The balance of plaintiff's argument, dealing with what he terms equitable restitution, is irrelevant to the Eleventh Amendment.

Next, plaintiff asks for costs, to include counsel fees. Although Edelman did not consider the question, we think it offers guidance. Edelman reaffirms the longstanding proposition that the major objective of the Eleventh Amendment is to protect state treasuries against judicial levy. 415 U.S. at 662-65. See Jordan v. Gilligan, 6 Cir., 1974, 500 F.2d 701, 706; The Supreme Court, 1973 Term, 1974, 88 Harv.L.Rev. 13, 246-47. In this light we find unpersuasive attempts to permit monetary assessments, as against Eleventh Amendment claims, simply because they may be characterized as remedial or administrative rather than compensatory. See Gates v. Collier, 5 Cir., 1973, 489 F.2d 298, 302. In either case the treasury is taxed. Cf. Gilligan, ante, 500 F.2d at 708. Indeed, Edelman itself exploded such distinctions, assuming arguendo that the restitution there sought might be termed "equitable," 415 U.S. at 665, 669, while barring such relief for its fiscal interference. Id. at 668-69. See also Ford Motor Co. v. Department of Treasury, 1945, 323 U.S. 459, 462-64.

It may well be that Fairmont Creamery Co. v. Minnesota, 1927, 275 U.S. 70, 74, imposing ordinary court costs against a state as one of the "incidents of the hearing . . . which attach to the regular jurisdiction" of the federal court, 275 U.S. at 77, survives the proscription of Edelman. See Boston Chapter, N.A.A.C.P., Inc. v. Beecher, 1 Cir., (11/8/74), F.2d . However, we regard the imposition of attorneys fees to be in a different category. Absent statutory or contractual authorization, such awards are made for a variety of

reasons. See Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 1 Cir., 1973, 484 F.2d 1331, 1332-34. They punish bad faith or frivolous postures. Id. at 1333; Beecher, ante, slip op. at 3; Class, ante, slip op. at 92. They spread the cost of litigation among classes benefiting from the judgment. Hall v. Cole, 1973, 412 U.S. 1, 5-7; Mills v. Electric Auto-Lite Co., 1970, 396 U.S. 375, 392-95. They reward, and hence encourage, litigants who secure decisions of public as well as private interest. Newman v. Piggie Park Enterprises, Inc., 1968, 390 U.S. 400, 402 (per curiam); National Resources Defense Council, Inc., ante, 484 F.2d at 1333. Each of these objectives reflects independent policy considerations unrelated to the enforcement of injunctions, and in no sense can be termed "integral" to such relief.

The area possibly closest to integral costs is where a party has had special burdens in respect to the conduct of the litigation itself. In the present case plaintiff's course has not been made more onerous by any harassment or bad faith. Nor was he in the position of representing a class, either in fact, or in the background.[2] We deny plaintiff's request for an award of counsel fees both as a matter of law, and as a matter of discretion.

As to regular court costs, we adopt, without further consideration, the view of the Court of Appeals for this Circuit in Beecher, ante, and hold that defendants are chargeable.

Bailey Aldrich
U. S. Circuit Judge

Frank H. Freedman
U.S. District Judge

J. F. Tauro
U.S. District Judge

2. Only one additional individual and a latecomer at that, has sought representation as a party plaintiff. So far as a class is concerned, the State Police Association of Massachusetts, as amicus, has sought to disassociate itself from plaintiff's position.

APPENDIX

UNITED STATES DISTRICT COURT

DISTRICT OF MASSACHUSETTS

ROBERT D. MURGIA Plaintiff v. COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT, ET AL Defendants	)	CIVIL ACTION NO. 72-2083-T

ORDER

TAURO D.J. December 12, 1974

In accordance with our opinion of May 31, 1974, Mass. Gen. Laws c. 32 § 26(3) is declared unconstitutional and void and the defendants are enjoined from further enforcement of the section. It is further ordered that the plaintiff be reinstated to the position of Lt. Colonel in the Uniformed Branch of the Massachusetts State Police. Costs are taxed against defendants.

This order is stayed pending appeal, provided that notice of appeal is filed within thirty (30) days.

Bailey Aldrich
U. S. Circuit Judge

Frank H. Freedman
U. S. District Judge

J. F. Tauro
U. S. District Judge

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

ROBERT D. MURGIA,
Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT,
ROBERT Q. CRANE, ANGELO AMATO,
and J. JOSEPH MALONEY, JR.,
as They Are Members of the
COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT, and
JAMES W. CALLANAN, Executive Secretary
of the COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT,
Defendants

CIVIL ACTION
NO. 72-2083-T

NOTICE OF APPEAL

Notice is hereby given that the Members and Executive Secretary of the Commonwealth of Massachusetts Board of Retirement and the Commissioner of Public Safety of the Commonwealth of Massachusetts, Defendants in the above-entitled action, hereby appeal to the Supreme Court of the United States from the Order enjoining the Defendants from further enforcement of Mass. G. L. c. 32, § 26(3) entered by a three-judge court in this action on the 12th day of December, 1974.

By their attorney,

Terence P. O'Malley
TERENCE P. O'MALLEY
Assistant Attorney General

December 23, 1974

CERTIFICATE OF SERVICE

I, Terence P. O'Malley, a member of the bar of the United States District Court for the District of Massachusetts, hereby certify that I have mailed a copy of the within Notice of Appeal to Robert L. Wise, Esq., Wise and Wise, 79 Milk Street, Boston, Mass. 02109 and Robert D. City, Esq., Moulton, Looney, Mazzone, Falk & Markham, 15 Broad Street, Boston, Mass. 02109 on this 23rd day of December, 1974.

Terence P. O'Malley
Terence P. O'Malley

Supreme Court, U. S.
FILED
MAR 13 1975
MICHAEL RODAK, JR., CLERK

No. 74-1044

In The Supreme Court of The United States

OCTOBER TERM, 1974

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

APPENDIX TO JURISDICTIONAL STATEMENT

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APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 72-2083-LC — CIVIL ACTION

ROBERT D. MURGIA,
Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT
Defendant

MEMORANDUM AND ORDER

CAMPBELL, D. J.

I

Plaintiff is the executive officer and lieutenant colonel of the Uniformed Branch of the Massachusetts State Police, with over 24 years service in that branch. On July 23, 1972, when he reaches the age of 50, he will be retired from the state police, pursuant to M.G.L. ch. 32, sec. 26(3)(a), which requires that the state board of retirement retire members

of the Uniformed Branch when they reach 50 or complete 20 years service, whichever occurs later.

Plaintiff brings this action, asserting jurisdiction under 28 U.S.C. § 1343(3), to enjoin the execution of ch. 32, § 26 (3)(a). He alleges that the statute discriminates against him in violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

Plaintiff claims that he is denied equal protection of a right to employment, in at least three ways:

> "(a) Men have been employed by the State Police, taken a leave of absence of many years, and returned to the force and continued their employment up to age 65 because they have not completed their 20 years service.
>
> (b) Detectives in the State Police who perform similar functions as the uniformed branch are permitted to continue in their employment under General Laws, Chapter 26(3) to the age of 65.
>
> (c) Women in the State Police by virtue of an exception in General Laws, Chapter 22, Section 9A are permitted to continue their employment beyond the age of 50." Complaint ¶ 7.

The immediate questions before this Court are whether or not to convene a three-judge court pursuant to 28 U.S.C. Secs. 2281 and 2284, and issue a preliminary injunction restraining plaintiff's forced retirement pending final determination of the case. A hearing addressed to these questions was held on July 18, 1972. There, in addition to the

arguments of counsel, the Court heard plaintiff present case-history examples and other evidence to illustrate the alleged discriminations described above. The Court also allowed a brief *amicus* statement to be made, opposing plaintiff's contentions, by counsel for the State Police Association of Masachusetts.

II

A three-judge court is not required to be convened if the constitutional question raised is insubstantial. *Ex Parte Poresky,* 290 U.S. 30 (1933). There the Court said:

> "The existence of a substantial question of constitutionality must be determined by the allegations of the bill of complaint . . . . The question may be plainly unsubstantial, either because it is 'obviously without merit' or because 'its unsoundness so clearly results from the previous decisions of this court as to foreclose the subject and leave no room for the inference that the questions sought to be raised can be the subject of controversy'." 290 U.S. at 32.

More recently, the Supreme Court has reiterated that the question of substantiality is for the single judge to decide:

> "When an application for a statutory three-judge court is addressed to a district court, the court's inquiry is appropriately limited to determining whether the constitutional question raised is substantial, whether the complaint at least formally alleges a basis for equitable relief, and whether the case presented otherwise comes within the requirements of the three-judge statute." *Idelwild Bon Voyage Liquor Corp.* v. *Epstein,* 370 U.S.

713, 715 (1962). See also *Bailey* v. *Patterson*, 369 U.S. 31 (1962), *Swift & Co.* v. *Wickham*, 382 U.S. 111 (1965).

In deciding whether or not the constitutional question presented here is substantial, this Court feels that it should be guided by the following language of the Second Circuit Court of Appeals:

> "The easiest solution for the district judge, whenever the words 'United States Constitution' or 'Fourteenth Amendment' appear in a complaint, would be to relieve himself of two-thirds of the responsibility for the decision by requesting the convening of a three-judge court . . . [But a] district judge should not feel that he is merely a rubber stamp or that he exercise his judgment at his peril . . . [A]lthough this case may not be 'open and shut' (so few cases are), the decisions of the Supreme Court and other courts which are as analogous as possible to this case should be examined to ascertain whether they 'foreclose the subject' . . . Of course, no two cases involving equal protection are alike as to facts and, were mere factual variation the test, all cases should be channeled to the Supreme Court on the chance that some distinguishing feature might be found. However, the Supreme Court reminds us that '[t]he Three-judge requirement is a technical one to be narrowly construed. *Phillips* v. *United States*, 312 U.S. 246, 251 . . . .' " *Johnson* v. *New York State Education Department*, 449 F.2d 871, 875-6 (2nd Cir. 1971). Compare *Jackson* v. *Choate*, 404 F.2d 910, 913 (5th Cir. 1968).

III

Upon examination of analogous Supreme Court and lower court cases, I conclude that plaintiff's federal constitutional claim is without merit.

This is not a case where a plaintiff is alleging discrimination based upon a suspect classification such as religion or race, or deprivation of some fundamental right such as the right to vote. Statutory classifications of such a nature are subject to special scrutiny by the courts. *Brown* v. *Board of Education*, 347 U.S. 483 (1954), *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966).

The plaintiff has pointed to no case bringing the right sought to be protected here, the right to continued employment beyond a specified age or period of service, within the area where only a compelling interest allows the state to maintain the challenged classification. Indeed, one case plaintff relies on did not even consider the constitutional question, *Allen* v. *Borough of West Mifflin*, 419 Pa. 394, 214 A. 2nd 502 (1965), and the other held *against* the officers complaining of forced retirement, *Boyle* v. *City of Philadelphia*, 338 Pa. 129, 12 A. 2d 43 (1940).

Absent any allegations touching off strict scrutiny of the challenged classification, the task before the court is to determine whether the "classification bear[s] some rational relationship to a legitimate state purpose." *Weber* v. *Aetna Casualty & Surety Company*, Supreme Court Slip Opinion, April 24, 1972, at 8, and cases cited therein.

The Supreme Court has applied this test where classifications depriving persons of employment opportunities are

challenged. *Kotch* v. *Board of River Port Pilot Comm'rs*, 330 U.S. 552 (1947), *Goesaert* v. *Cleary*, 335 U.S. 464 (1948).

According to counsel for the Commonwealth, the purpose of the challenged statute is to insure that the Uniformed Branch of the state police be a "young, vigorous force." Early retirement even of high-ranking officers gives younger men a chance for promotion and ensures that commanders possess the physical vigor to accompany their men in the field. These are surely legitimate purposes. Mandatory retirement at the age of 50 is at least a rational, if not the only, means of achieving them.

True, the statute provides that a state policeman may not be retired until he has reached 20 years' service if that should occur after he has reached 50. The Commonwealth explains that this provision merely tempers the age-50 requirement in the interest of having a policeman serve long enough to merit a pension.

Under usual circumstances, a man will be forced to retire at age 50 in any event, since he may enlist in the state police for the first time only between the ages of 21 and 29. M.G.L. ch. 22, § 9a, effective Dec. 1, 1939. But it has happened, for various reasons, that some members have exceeded or will exceed age 50 when they retire. Thus, before the effective date of § 9a, some men over 29 enlisted. Others, by special statutory dispensation, were allowed to enlist after they had reached 30 if they had served in the armed forces during World War II. Ch. 22, § 9a, as amended by the Acts of 1946, ch. 260.

A notarized letter by the Commissioner of Public Safety, made an appendix to this opinion, shows that most uniformed policemen over 50 at retirement are in the above two categories. The case histories produced by the plaintiff's own search do not contradict this conclusion.

Finally, in some instances, members have left and then returned to the service, and hence are over 50 before putting in 20 years total service. But as the Commissioner's notarized letter makes clear, relatively few men are in this category: Only two men presently in the service, and two men who have retired.

Only to the limited extent illustrated by the examples given above is the principal statutory purpose thwarted. The Commissioner states that since 1921 only 35 out of 2,061 individuals enlisted in the Uniformed Branch served over the age of 50.

As for the differences between the treatment of the plaintiff and the treatment of detectives and women, it is surely rational to differentiate between those whose jobs require primarily patrolling, and crime prevention and control, and those whose duties require less athletic and physically demanding work. Detectives, whose primary task is investigation, and women, whose primary task is dealing with women and children, could rationally be determined by the legislature to fall within this latter category.

That detectives and women sometimes perform physically taxing work does not, because it produces a minor inconsistency in the statutory scheme, make the statute constitutionally invalid.

It is also true that uniformed members assigned to the detective branch, or to other offices where physically demanding work is not required, are still forced to retire at 50.

This and other inconsistencies in the statutory scheme may be imperfections. But, as the Supreme Court has said:

> "In the area of economics and social welfare, a State does not violate the Equal Protcetion Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality' . . . . The problems of government are practical ones and may justify, if they do not require, rough accommodations — illogical, it may be, and unscientific' . . . . 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' " *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). See also *Briggs* v. *Kerrigan,* 431 F.2d. 967, 968-9 (1st Cir. 1970).

Plaintiff's prayers for a temporary restraining order and for the convening of a three-judge court are denied. As the complaint does not raise a substantial constitutional question, and as it is essential to jurisdiction that a substantial constitutional question be raised, the complaint is dismissed. *Ex Parte Poresky,* 290 U.S. 30 (1933), *Rosado* v. *Wyman,* 397 U.S. 397 (1970).

/s/ LEVIN H. CAMPBELL
United States District Judge

Date: July 21, 1972

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 72-2083-LC — CIVIL ACTION

ROBERT D. MURGIA,

vs.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT

JUDGMENT

July 26, 1972

CAMPBELL, District Judge,

After hearing, and in accordance with the Memorandum and Order of the Court entered July 21, 1972, it is hereby ORDERED

Judgment for the defendant;

complaint dismissed.

By the Court,
/s/ SUSAN A. TEBO
Deputy Clerk

/s/ LEVIN H. CAMPBELL
United States District Judge

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 72-1300

ROBERT D. MURGIA,
Plaintiff, Appellant,

v.

COMMONWEALTH OF MASSACHUSETTS,
BOARD OF RETIREMENT,
Defendant, Appellee.

Before COFFIN, *Chief Judge*
MCENTEE, *Circuit Judge,*
and KILKENNY, *Senior Circuit Judge.*

[SEAL]
U.S. COURT OF APPEALS FOR THE FIRST CIRCUIT
Filed in Clerk's Office
Sep 10 1973

MEMORANDUM AND ORDER

Entered: September 10, 1973

The court, mindful of the strictures of *Goosby* v. *Osser,* 409 U.S. 512 (1972) and of the ambiguities in *Frontiero* v. *Richardson* ... U.S. ... (May 14, 1973), both decided subsequently to the decisions below, is unable to say that the claims presented afford "no room" for controversy. It is ordered that the judgment be set aside and the case is remanded for the impanelling of a three-judge court. No costs.

By the Court:
/s/ DANA H. GALLUP
Clerk.

Enter: COFFIN, Ch. J.
[cc: Messrs. City and O'Malley.]

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 72-2083-T CIVIL ACTION

ROBERT D. MURGIA,
Plaintiff,

v.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT et al.,
Defendants.

OPINION

Before ALDRICH, *Senior Circuit Judge,*
FREEDMAN and TAURO, *District Judges.*

May 31, 1974

ALDRICH, *Senior Circuit Judge.* Plaintiff, Robert D. Murgia, brings this three-judge district court action to declare unconstitutional, and to obtain injunctive relief against the enforcement of, Mass. G.L. c. 32 § 26(3). Pursuant to that statute plaintiff, a Lt. Colonel in the Uniformed Branch of the Massachusetts State Police, was involuntarily retired because, having completed over 20 years of service, he had reached age 50. He alleges that mandatory retirement at that age is a violation of his civil rights of due process and equal protection. He also alleges sex discrimination because under the law, although apparently not now in practice, women police officers may enlist after age 30, and thus auto-

matically may serve beyond age 50.[1] We reach only one issue, that a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest.

Until age 40 every officer is given a comprehensive physical examination every two years, and after age 40, every year. Failure to pass results in disability retirement unless the particular physical defect is waived by the Commissioner of Public Safety.[2] Plaintiff's standing is self-evident; the testimony is undisputed that at the time of his discharge he was in excellent physical health and capable of performing the duties of a state police officer, whether involving physical or psychological stress. At the same time, it is acknowledged that service in this branch is, or can be, arduous,[3] and that high versatility is required, with few, if any, backwaters available for the partially superannuated. Lest there be misunderstanding, we do not fault the service in this respect; the state is entitled to maintain rigorous job requirements; nor do we understand plaintiff to contend otherwise.

Our first question could be the standard to apply in test-

[1] Had plaintiff not served 20 years, he could have remained on the force until he did so. However, since under the law no male may enlist after age 30, this extension can presently occur only for certain individuals who have resigned, or taken a leave of absence, and rejoined at some later date. On the record this is an unusual occurrence, and we will assume the existence of legitimate grounds for the exception. Nor will we concern ourselves with the technical sex discrimination.

[2] Senior officer of the Uniformed Branch, and head of the Department of Public Safety, of which the State Police is a division.

[3] We assume, at least for present purposes, that the duties are sufficiently more arduous than, or the physical and mental stresses significantly different from, those of detectives or policemen in other branches and at other levels of government, so that there is no viable unequal protection claim in this area.

ing the constitutionality of the statute; whether, because plaintiff's right to employment may be a fundamental interest or because age might be a suspect classification, the burden is on the state to show a compelling interest, or whether, on the other hand, the burden is on the plaintiff to show a lack of rational basis. However, since we find that plaintiff has succeeded in this last, we need not proceed further. We hold that plaintiff has at least a recognizable interest in retaining his employment[4] which the state cannot deny arbitrarily and irrationally, *Drown* v. *Portsmouth School District*, 1 Cir., 1971, 451 F.2d 1106, 1108; *see Board of Regents* v. *Roth*, 1972, 408 U.S. 564, 576-77; *Wieman* v. *Updegraff*, 1952, 344 U.S. 183, 192, and we find that mandatory retirement of officers at 50 years of age bears no "fair and substantial relation to the object of the legislation," *F. S. Royster Guano Co.* v. *Virginia*, 1920, 253 U.S. 412, 415, quoted in *Reed* v. *Reed*, 1971, 404 U.S. 71, 76.

We dispose readily of certain of the state's contentions. Its argument that early retirement enhances the morale of the younger members, in a sense assumes the point. Of course, if there are only younger members, they are happier than the older members who are being eliminated. This does not add up on balance, but merely advances the time of ultimate unhappiness.[5] The same can be said with respect to the alleged desirability of rapid promotion; the attractiveness of quick promotion must be weighed against the unattractiveness of early retirement. Furthermore, to

[4] To the extent that it may affect plaintiff's due process rights, *see Board of Regents* v. *Roth*, 1972, 408 U.S. 564, we note that after six years of service no officer who passes the physical can be denied reenlistment. Mass. G.L. c. 22, § 9A.

[5] We would concede vitality to the morale argument if officers not capable of carrying their full load were to be retained, but this is not the question. *See* ante.

the extent that the purpose of early retirement is said to be to empty higher ranking positions after they have been occupied by one person for a reasonable time, the cut-off at 50 years is of questionable consequence since it is unrelated to the period of time the retiree has occupied his last position.[6] The alleged desirability of facilitating rapid promotion by early retirement, rather than a justification, will be seen on analysis to be age discrimination per se.

The only question requiring serious consideration is whether mandatory retirement at age 50 is rationally related to maintaining a vigorous, healthy personnel. Even plaintiff's experts concede that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job. On the other hand, the state does not dispute their testimony that the relation between chronological age and functional age varies greatly from one individual to the next. Its response is that in matters of this sort it is administratively reasonable to select an arbitrary cut-off, and that irrationality is not established by the fact that certain individuals are disadvantaged thereby. *Cf. Wickard* v. *Filburn,* 1942, 317 U.S. 111, 129-30.

We fully accept the necessity of choosing arbitrary standards in certain, and indeed in many, situations. For example, in dealing with the immeasurable changes relating to the onset of maturity, legislatures may require a specific age for voting, *Oregon* v. *Mitchell,* 1970, 400 U.S. 112, even though the particular age selected may seem indifferentiable from other ages in proximity to it. *Id.* at 294 (Stewart, J., concurring in part and dissenting in part); *see id.* at 243-46 (Brennan, White and Marshall, JJ., concurring in part and

[6] An officer qualifying for promotion, or for further promotion, is not required to accept it.

dissenting in part). *See also, e.g., United States* v. *Duncan,* 9 Cir., 1972, 456 F.2d 1401, 1405 (minimum age for jury service), *vacated on other grounds,* 409 U.S. 814; *Smith* v. *United States,* 9 Cir., 1970, 424 F.2d 267 (selective service age limitations); *Scarangella* v. *Commissioner,* 3 Cir., 1969, 418 F.2d 228 (classification of tax exemptions by age of dependent). But to say that a line may be drawn arbitrarily when there is no readily discernible breaking, or turning, point, does not mean that the line can be drawn anywhere at all. To satisfy minimal standards of rationality the line must be drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is preferable to any other.

In the voting and other cases above cited, the legislature was concerned with a broad spectrum of the population where it would not be practicable to make individual determinations. Under such circumstances an arbitrary standard is called for, if not inevitable, and the only question must be whether the one selected is, in the large, reasonable. In the case at bar the situation is exactly the reverse. Individual testing is not impracticable but, rather, is already the order of the day. There is no suggestion that it is more burdensome to examine an officer at age 50 than it was at age 49. We must look, therefore, in another direction for reasonableness — is there, for example, a greater risk at the higher age that the test, or, more exactly, the prognosis based upon testing, will be less reliable?

In this connection we note the case of *Air Line Pilots Ass'n, Int'l* v. *Quesada,* 2 Cir., 1960, 276 F.2d 892, *cert. denied,* 366 U.S. 962, upholding as not "arbitrary and discriminatory and without relation to any requirement of safety" an administrative ruling disqualifying pilots from

active duty upon reaching age 60. In so doing the court pointed out the comprehensive study conducted by the administrator, and the documented reasons for his conclusion that by age 60, in spite of medical testing, a critical area had been reached. *See* 276 F.2d at 898. No such determination has been, or could be made, in the case at bar. So far as appears, no study has been conducted of any kind. While there has been a compilation of certain statistics, from defendants' standpoint they are counter-productive. Not only did no expert testify to any significance in age 50 in a group which, by hypothesis, had individually passed annual tests during the preceding decade, but statistics of actual experience forecast no imminent change. In the Uniformed Branch during the period November 1967 to December 1973 there were fifteen discharges of persons between the ages of 40 and 50 for non-injury disability, divided as follows.

Age 40-3	Age 45-1
41-3	46-3
42-1	47-2
43-1	48-1
44-0	49-0
—	—
8	7

The force of these figures is not offset by a growth curve of waivers in the place of disability retirements.[7] The sta-

[7] Thus in the year 1973, ten waivers of partial, although permanent, non-injury disability were granted in the 40-50 age group. These divided as follows:

Age 40-0	Age 45-2
41-2	46-0
42-1	47-0
43-1	48-2
44-2	49-0
—	—
6	4

tistics furnish no reason to suppose that age 50 is within, or even significantly approaching, a range where changes of conditions warrant a change of treatment. Rather, they contradict it.

If, further, we turn from Massachusetts to national experience as disclosed by legislative response, plaintiff has furnished a list of statutes from which it appears that Massachusetts is the only state compulsorily retiring police officers before age 55.

On this record we find that mandatory retirement at age 50, where individualized medical screening is not only available but already required, is no more rational, and no more related to a protectable state interest, than the mandatory suspension or discharge of school teachers upon reaching their fourth or fifth month of pregnancy.[8] *Cleveland Board of Education* v. *LaFleur*, (1/21/74) .... U.S. ..... Recognizing the public interest in protecting individuals' right to work, and against discrimination on account of age, *see, e.g.*, Age Discrimination in Employment Act of 1967, 29 U.S.C. § 621; Mass. G.L. c. 149, §§ 24A and 151B, we are compelled to strike down the present age distinction where plaintiff has established the absence of any factual basis therefor.[9]

[8] We do not regard *Thomas* v. *Pate*, 7 Cir., 1974, 493 F.2d 151 (prisoners under 40 denied free long underwear) as in any way contra. We read that case, *inter alia*, as one where plaintiff failed to make allegations specific enough to raise an issue of irrationality.

[9] Whether we would reach the same result if the statute selected a more customary retirement age is not before us. With great respect to Mr. Justice Rehnquist, dissenting in *Cleveland Board of Education* v. *LaFleur*, ante, we would anticipate the question of mandatory retirement at age 70 not to be the same as at age 50, but perhaps we say this because of the increasing difficulties that a plaintiff might have to show that at that greater age the state had not made out a factually rational argument.

Judgment will be entered declaring Mass. G.L. c. 32 § 26 (3) unconstitutional and void, and awarding, after hearing, appropriate mandatory relief.

/s/ BAILEY ALDRICH
U.S. Senior Circuit Judge
/s/ FRANK H. FREEDMAN
U.S. District Judge
/s/ JOSEPH L. TAURO
U.S. District Judge

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 72-2083-T — CIVIL ACTION

ROBERT D. MURGIA,
Plaintiff,
v.
COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT et al.,
Defendants.

OPINION

December 12, 1974.

Before ALDRICH, *Senior Circuit Judge,*
TAURO and FREEDMAN, *District Judges.*

ALDRICH, *Senior Circuit Judge.* We are now concerned with the measure of relief to be afforded as a result of our decision in *Murgia* v. *Commonwealth of Massachusetts Board of Retirement,* D.Mass., 1974, 376 F.Supp. 753, holding unconstitutional Mass. G.L. c. 32, § 26(3), which required the involuntary discharge of plaintiff Murgia from the State Police force, although he was physically qualified, simply because he had reached age 50. The first question is whether all issues now presented are properly subject to resolution by three judges, or whether some are for the single judge alone. The parties have sought the former course, and since all three judges are in agreement on the

merits, we see no basis for complaint here whether our decision to sit jointly is legally correct or not.[1]

A few comments are in order with respect to what we are not including in our judgment. Plaintiff asks that we require that his reappointment be to the position of Deputy Superintendent, a position recently created by the Massachusetts legislature, possibly on account of our earlier decision. We decline to do so. Plaintiff was retired with the rank of Lt. Colonel, and it is to this position that he should be restored. The fact that there was only one officer with a higher rank at the time of his dismissal does not guarantee that if he had not been dismissed he would have been entitled to the new superior position. In any event, we do not propose to organize the State Police. If, by some seemingly remote possibility plaintiff hereafter is able to show, in connection with his reinstatement, discriminiation amounting to a failure fully to comply with our judgment, that would be another matter.

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[1] We recognize, of course, that jurisdiction cannot be conferred by consent or waiver. *Americans United for Separation of Church and State* v. *Paire*, 1 Cir., 1973, 475 F.2d 462, 464. Given our unanimity, however, the question of three judges does not affect the outcome, and will come into focus only in case of an appeal, viz., whether it should lie wholly to the Supreme Court, or to the Court of Appeals as well on the issue of relief here considered. *See Socialist Workers Party* v. *Rockefeller*, S.D.N.Y., 1970, 314 F.Supp. 984, 996-97, *aff'd*, 400 U.S. 806, *appeal dismissed*, 400 U.S. 962; *Swift & Co.* v. *Wickham*, S.D.N.Y., 1964, 230 F.Supp. 398, *aff'd*, 2 Cir., 364 F.2d 241, *cert. denied*, 385 U.S. 1036. The question of relief at issue seems sufficiently bound up with the equitable remedy sought by plaintiff to be appropriate for consideration by three judges. *See Baltimore & Ohio R.R. Co.* v. *United States*, 1929, 279 U.S. 781, 785; *Department of Employment* v. *United States*, 385 U.S. 355, 357, *aff'g* 263 F.Supp. 581. At the least, the decision to retain three-judge jurisdiction may be within our discretion, *see Jenkins* v. *McKeithen*, E.D. La., 1968, 286 F.Supp. 537, 542, *rev'd on other grounds*, 395 U.S. 411, and, if so, we exercise that discretion in favor of retention.

Next, plaintiff asks us to include an order for back pay, which he describes as "restitution of compensation withheld." The parties, inter sese, have made various calculations and adjustments, and have stipulated to the amount, but defendants, citing the Eleventh Amendment, and *Edelman* v. *Jordan*, 1974, 415 U.S. 651, contest our right to make any award.

In *Edelman* the Court affirmed a judgment declaring unconstitutional certain state practices barring plaintiffs from receiving welfare benefits, but reversed a money judgment awarding retroactive benefits of which plaintiffs had been deprived. The Court held that although such payment was denominated equitable restitution and in substance might be so considered, this did not serve to avoid the Eleventh Amendment's strictures. Plaintiff's attempted distinctions are not persuasive. First, plaintiff says that his discharge was after the institution of the action, so that there would be no retroactive effect on the state treasury because the state was on notice when it failed to keep the money. This argument proves too much. If defendants retained plaintiff in his position they would have violated the statute, as yet not held unconstitutional. If they discharged him they could not retain the funds, because they had to hire a replacement.

Next, plaintiff argues that since the amount of the payment here is not substantial, perhaps defendants will, or should pay it in their individual capacities. They support this contention with the claim that defendants' action was not "simple good faith application of the provisions of the statute" because they knew of the pendency of the action. Our previous answer applies here, if anything more strongly. *Cf. Class* v. *Norton*, 2 Cir., 10/10/74, ... F.2d .... The balance of plaintiff's argument, dealing with what he

terms equitable restitution, is irrelevant to the Eleventh Amendment.

Next, plaintiff asks for costs, to include counsel fees. Although *Edelman* did not consider the question, we think it offers guidance. *Edelman* reaffirms the langstanding proposition that the major objective of the Eleventh Amendment is to protect state treasuries against judicial levy. 415 U.S. at 662-65. *See Jordan* v. *Gilligan,* 6 Cir., 1974, 500 F.2d 701, 706; The Supreme Court, 1973 Term, 1974, 88 Harv.L.Rev. 13, 246-47. In this light we find unpersuasive attempts to permit monetary assessments, as against Eleventh Amendment claims, simply because they may be characterized as remedial or administrative rather than compensatory. *See Gates* v. *Collier,* 5 Cir., 1973, 489 F.2d 298, 302. In either case the treasury is taxed. *Cf. Gilligan,* ante, 500 F.2d at 708. Indeed, *Edelman* itself exploded such distinctions, assuming arguendo that the restitution there sought might be termed "equitable," 415 U.S. at 665, 669, while barring such relief for its fiscal interference. *Id.* at 668-69. *See also Ford Motor Co.* v. *Department of Treasury,* 1945, 323 U.S. 459, 462-64.

It may well be that *Fairmont Creamery Co.* v. *Minnesota,* 1927, 275 U.S. 70, 74, imposing ordinary court costs against a state as one of the "incidents of the hearing . . . which attach to the regular jurisdiction" of the federal court, 275 U.S. at 77, survives the proscription of *Edelman. See Boston Chapter, N.A.A.C.P., Inc.* v. *Beecher,* 1 Cir., (11/8/74), ... F.2d .... However, we regard the imposition of attorneys fees to be in a different category. Absent statutory or contractual authorization, such awards are made for a variety of reasons. *See Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency,* 1 Cir., 1973,

484 F.2d 1331, 1332-34. They punish bad faith or frivolous postures. *Id.* at 1333; *Beecher,* ante, slip op. at 3; *Class,* ante, slip op. at 92. They spread the cost of litigation among classes benefiting from the judgment. *Hall* v. *Cole,* 1973, 412 U.S. 1, 5-7; *Mills* v. *Electric Auto-Lite Co.,* 1970, 396 U.S. 375, 392-95. They reward, and hence encourage, litigants who secure decisions of public as well as private interest. *Newman* v. *Piggie Park Enterprises, Inc.,* 1968, 390 U.S. 400, 402 (per curiam); *National Resources Defense Council, Inc.,* ante, 484 F.2d at 1333. Each of these objectives reflects independent policy considerations unrelated to the enforcement of injunctions, and in no sense can be termed "integral" to such relief.

The area possibly closest to integral costs is where a party has had special burdens in respect to conduct of the litigation itself. In the present case plaintiff's course has not been made more onerous by any harassment or bad faith. Nor was he in the position of representing a class, either in fact, or in the background.[2] We deny plaintiff's request for an award of counsel fees both as a matter of law, and as a matter of discretion.

As to regular court costs, we adopt, without further consideration, the view of the Court of Appeals for this Circuit in *Beecher,* ante, and hold that defendants are chargeable.

/s/ Bailey Aldrich
U.S. Senior Circuit Judge
/s/ Frank H. Freedman
U.S. District Judge
/s/ Joseph L. Tauro
U.S. District Judge

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[2] Only one additional individual, and a latecomer at that, has sought representation as a party plaintiff. So far as a class is concerned, the State Police Association of Massachusetts, as amicus, has sought to disassociate itself from plaintiff's position.

APPENDIX

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

No. 72-2083-T — CIVIL ACTION

ROBERT D. MURGIA,
Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT, ET AL
Defendants

ORDER

TAURO D.J.
December 12, 1974

In accordance with our opinion of May 31, 1974, Mass. Gen. Laws c. 32 § 26(3) is declared unconstitutional and void and the defendants are enjoined from further enforcement of the section. It is further ordered that the plaintiff be reinstated to the position of Lt. Colonel in the Uniformed Branch of the Massachusetts State Police. Costs are taxed against defendants.

This order is stayed pending appeal, provided that notice of appeal is filed within thirty (30) days.

/s/ BAILEY ALDRICH
U.S. Senior Circuit Judge
/s/ FRANK H. FREEDMAN
U.S. District Judge
/s/ JOSEPH L. TAURO
U.S. District Judge

APPENDIX

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MASSACHUSETTS

No. 72-2083-T — CIVIL ACTION

ROBERT D. MURGIA,
Plaintiff

v.

COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT, ROBERT Q. CRANE,
ANGELO AMATO, and J. JOSEPH MALONEY, JR.,
as They Are Members of the
COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT and
JAMES W. CALLANAN, Executive Secretary of the
COMMONWEALTH OF MASSACHUSETTS
BOARD OF RETIREMENT,
Defendants

NOTICE OF APPEAL

Notice is hereby given that the Members and Executive Secretary of the Commonwealth of Massachusetts Board of Retirement and the Commissioner of Public Safety of the Commonwealth of Massachusetts, Defendants in the above-entitled action, hereby appeal to the Supreme Court of the United States from the Order enjoining the Defendants

from further enforcement of Mass. G.L. c. 32, § 26(3) entered by a three-judge court in this action on the 12th day of December, 1974.

By their attorney,
/s/ TERENCE P. O'MALLEY
Assistant Attorney General

December 23, 1974

CERTIFICATE OF SERVICE

I, Terence P. O'Malley, a member of the bar of the United States District Court for the District of Massachusetts, hereby certify that I have mailed a copy of the within Notice of Appeal to Robert L. Wise, Es., Wise and Wise, 79 Milk Street, Boston, Mass. 02109 and Robert D. City, Esq., Moulton, Looney, Mazzone, Fall & Markham, 15 Broad Street, Boston, Mass. 02109 on this 23rd day of December, 1974.

/s/ TERENCE P. O'MALLEY

Supreme Court, U. S.
FILED
FEB 20 1975
MICHAEL RODAK, JR., CLERK

74-1044

No.....

In The Supreme Court of The United States

OCTOBER TERM, 1974

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMICUS CURIAE BRIEF OF STATE POLICE ASSOCIATION OF MASSACHUSETTS IN SUPPORT OF APPELLANTS

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In The Supreme Court of The United States

OCTOBER TERM, 1974

No.....

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMICUS CURIAE BRIEF OF STATE POLICE ASSOCIATION OF MASSACHUSETTS IN SUPPORT OF APPELLANTS

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 42, consent of the parties having been obtained, the State Police Association

of Massachusetts files this Brief as Amicus Curiae in support of the Appellants prior to the Court's consideration of the Jurisdictional Statement.

QUESTION PRESENTED

Whether the Massachusetts statute mandating the retirement of a State Police officer upon reaching the age of fifty is constitutional?

STATEMENT OF INTEREST OF STATE POLICE ASSOCIATION OF MASSACHUSETTS

The State Police Association of Massachusetts (hereafter Association) is the certified and recognized collective bargaining agent and representative of and for the 861 members of the Uniformed Branch of the Massachusetts State Police in and holding the ranks of Trooper, Policewoman, Corporal, Sergeant and Staff Sergeant. The total complement of the Uniformed Branch is 915, of which number 54 are in the ranks of Lieutenant, Captain, Major, Lieutenant Colonel and Deputy Superintendent.

The Association filed an amicus curiae brief in the United States District Court for the District of Massachusetts in support of Appellants.

The Association's interest in the mandatory retirement statute is to maximize the physical capability of members of the Uniformed Branch, to assure increased promotion opportunities, and, thereby, to advance and encourage employee morale and incentive.

STATEMENT OF THE CASE AND JURISDICTION

The Association, as Amicus Curiae, hereby adopts the Statement of the Case of the Appellants, as well as their Statement of Jurisdiction.

THE QUESTION IS SUBSTANTIAL

The Association joins with the Appellants in stating that the holding of the court below — that the mandatory retirement of state police officers at the age of fifty contravenes the constitution of the United States — presents a substantial question requiring plenary consideration by this Court. Therefore, the Association respectfully urges this Court to consider the merits of Appellants' appeal, to note probable jurisdiction, and to set the case down for argument.

Respectfully submitted,

HENRY FRIEDMAN
HENRY WISE
ROBERT L. WISE
Attorneys for the State Police Association of Massachusetts, as Amicus Curiae

Supreme Court, U. S.
FILED
JUL 17 1975
MICHAEL RODAK, JR., CLERK

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1044

MASSACHUSETTS
BOARD OF RETIREMENT, ET AL.,
APPELLANTS,

v.

ROBERT D. MURGIA,
APPELLEE.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF MASSACHUSETTS

FILED FEBRUARY 21, 1975

PROBABLE JURISDICTION NOTED MAY 19, 1975

APPENDIX

In the Supreme Court of the United States

October Term, 1974

No. 74-1044

Massachusetts Board of Retirement, ET AL.
Appellants

v.

Robert D. Murgia,
Appellee.

On Appeal From The United States District Court For The District Of Massachusetts

Filed February 21, 1975

Probable Jurisdiction Noted May 19, 1975

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UNITED STATES DISTRICT COURT

Three-Judge Court

Aldrich, Sr. J., Freedman, D. J., Tauro, D. J.

C.A. 72-2083-T

Commonwealth of Massachusetts Board of Retirmment and John J. Kehoe, Jr., Commissioner of Public Safety

Docket Entries

1972

July 7 Complaint filed. (Request for three-judge court and TRO)

17 Appearance of William F. Looney, Jr., for the pltf, filed.

17 MURRAY, D. J. DISQUALIFICATION entered. "I hereby disqualify myself in the within case for the reason that the plaintiff is represented by the law firm with whom my son Robert is associated in the practice of law."

18 CAMPBELL, D.J. Hearing on plaintiff's motion for temporary restraining order and request for three-judge Court; evidence,

testimony, plaintiff's memorandum of law...filed. Taken under advisement.

20 Affidavit of the plaintiff, Robert D. Murgia, filed.

21 CAMPBELL, D.J. MEMORANDUM AND ORDER ENTERED: "...Plaintiff's prayers for a temporary restraining order and for the convening of a three-judge court are denied. As the complaint does not raise a substantial constitutional question, and as it is essential to jurisdiction that a substantial constitutional question be raised, the complaint is dismissed. ...." Copy To Messrs. Looney, O'Callaghan and Mayo. West Pub.

26 CAMPBELL, D.J. JUDGMENT ENTERED: "Judgment for the defendant; complaint dismissed." Copy to Messrs. Looney, O'Callaghan and Mayo.

Aug. 18 Pltff's notice of appeal filed. Copy to Walter Mayor Esq.

18 Cost Bond in the amount of

$250.00 filed.

Aug. 21 Certified copy of docket entries and original pleadings delivered to the Court of Appeals.

1973

6/25 Stenographic transcript of proceedings on July 18, 1972 filed and delivered to the Court of Appeals under Supplemental Certificate.

Sep 10 Memorandum and Order received from the Court of Appeals entered..... It is ordered that the judgment be set aside and the case is remanded for the impanelling of a three-judge court. No. costs.

Oct 2 Mandate received from the Court of Appeals entered....Original pleadings returned from the Court of Appeals.

16 COFFIN, CH.J. Order entered designating Judges Aldrich, Freedman and Tauro as Three-Judge Court panel.

26 Defendant's Motion to Dismiss, filed c/s.

29 Letter dated October 19, 1973 to Mr. Doherty from Mr. City re hearing to be scheduled after January 11, 1974, filed.

1974

Jan. 16 Letter to Mr. Doherty, Deputy Clerk from Mr. Robert D. City, Esq. dated 1/16/74 RE: request for hearing in the month of March, filed.

18 Notice of hearing on the merits on Thursday, March 7, 1974 at 2 P.M. to Messrs. City, O'Malley and Wise. Counsel to file agree statement of facts by Noon, March 4, 1974.

Feb. 1 Notice of taking the deposition of Col Paul J. Murphy, filed c/s.

1 Notice of taking the deposition of Dr. Thomas F. Silva, Jr., filed c/s.

20 Notice of rescheduling of hearing to Wednesday, March 13, 1974 at 2 P.M. to Messrs. City, Wise and O'Malley.

22 Notice of the taking of the deposition of Dr. Thomas W.

Dawber, filed. c/s.

Mar. 6 Amended Complaint, filed c/s.

13 ALDRICH, S.C.J., FREEDMAN, D.J., TAURO, D.J., 3 Judge Court Hearing; Counsel to submit proposed schedule of events leading up to date of hearing on merits, within one week (3/20/74); Hearing on Defendant's Motion to Dismiss; Defendant and Plaintiff argue; Motion DENIED without prejudice.

19 Answer of the Dfts. CRANE, AMATO and MALONEY as members and the Dft. CALLANAN as Executive Secretary of the Board of Retirement of the Commonwealth of Mass., filed c/s.

20 Proposed Schedule of Events, filed

20 Request for Admission Under Rule 36, filed c/s.

20 TAURO, D.J., The proposed schedule of events is APPROVED and shall be considered an ORDER OF THE COURT. Copies to Counsel: Callaghan, Looney and O'Malley.

27 Letter to Clerk from Mr. City re schedule of hearing for April 4,

1974 at 10 A.M. Copy to ALDRICH, C.J., FREEDMAN, D.J. and TAURO, D.J.

29 Response of Dfts. to request for admissions, filed c/s.

Apr. 2 Affidavit of John F. Kehoe, Jr., filed c/s.

3 Affidavit of Dr. Thomas Lee Kurt, filed.

3 TAURO, D.J. Order entered: "...parties are instructed to file proposed findings of fact ...not later than April 29, 1974." Copy to Mr. Lucey and O'Malley and Wise.

3 Letter to Mr. Doherty from Mr. Lucey dated April 3, 1974 RE: waiver of live evidence-briefs instead., filed.

4 Agreed Documents (1 large Black Volume) filed, with copies for 3 Judges

25 Pltff's motion to extend time to file proposed findings of fact to May 3, 1974, assented to, filed.

26 TAURO, D.J. Above motion allowed.

Copy to Messrs. City and O'Malley and Judges Aldrich, Freedman and Tauro.

May 6 Defendants' Proposed findings of fact, filed c/s.

Defendants' brief, filed c/s.

6 Amicus Brief, filed c/s.

6 Brief for the Plaintiff, filed c/s.

7 Plaintiff's Request for Findings of Fact, filed c/s.

31 ALDRICH, SCJ., FREEDMAN, D.J. and TAURO, D.J. Opinion filed: "...Judgment will be entered declaring Mass. G.L. c 32 §26(3) unconstitutional and void, and awarding, after hearing, appropriate mandatory relief." Copy to Messrs. Wise, City, O'Malley, West Publishing Co. and Mass. Lawyers Weekly and Opinion Book.

June 7 Copy of Letter to Commissioner Kehoe from Mr. Looney, Esq. RE: meeting on Murgia decision and possibility of smoothly reinstating Col. Murgia, filed.

26 TAURO, D.J. Order entered: "The parties are requested to submit within three (3) weeks memoranda

detailing their respective views as to the form of relief that should issue in this case, particularly with respect to 1) reinstatement 2) back pay." Copy to Messrs. City, O'Malley, Wise and Judges Aldrich and Freedman.

July 17 Memorandum of the Dfts. as to the form of relief, filed c/s.

19 Pltff's memo as to the form of relief, filed c/s.

22 TAURO, D.J. Order entered: "The parties are requested to submit on or before August 26, 1974 memoranda on the question of whether the relief requested be considered by a three-judge court or a single judge." Copy to Messrs. City, O'Malley and Judges Aldrich and Freedman.

Aug 5 Pltff's memo on question of relief by single or three-judge court, filed

26 Dfts' memo as to whether the relief requested is to be considered by a three-judge court or a single judge, filed cs/.

Sep 24 Notice of hearing for October 22, 1974 at 2 P.M. to Messrs. City, Wise and O'Malley.

26 Motion for John F. Downey to be added as a party pltf., for the purpose of Mandatory relief, filed c/s.

Oct. 1 Opposition of defts to "Motion of John F. Downey to be added as a party pltf for the purpose of Mandatory Relief"

24 ALDRICH, S.C.J., FREEDMAN, D.J. and TAURO, D.J., Three-Judge Court Hearing motion to add party pltff., Denied; Motion to be filed adding Party deft., (Commissioner of Public Safety) Counsel to file proposed final order and briefs by Friday Oct. 25, 1974.

Nov 1 Supplemental memo of Pltff. on the question of the effect of the 11th amendment upon the relief to be granted plaintiff, filed;

1 Motion to Join John F. Kehoe, Jr., Commissioner of Public Safety as party Defendant, assented to, filed.

1 Proposed judgment, filed.

Dec 12 ALDRICH, C.J., FREEDMAN, D.J., TAURO, D.J.

Opinion and Order entered: "Mass. Gen. Law c 32 §26(3) is declared unconstitutional and void....It is further ordered that the plaintiff be reinstated to the position of Lt. Colonel in the Uniformed Branch of the Mass. State Police....This order is stayed pending appeal, provided that notice of appeal is filed within 30 days." Copy to Messrs. Wise, City, O'Malley, West Publishing Co., NCAIR and opinion book.

[TITLE OMITTED IN PRINTING]

COMPLAINT

1. The Complainant is a citizen of the Commonwealth of Massachusetts.

2. The action arises under U.S.C. Title 28, Section 1343 (3) and the Fourteenth Amendment to the Constitution of the United States, Section 1, as hereinafter more fully appears.

3. The Complainant is an officer of the State Police of the Commonwealth of Massachusetts with more than 20 years service, and will attain his fiftieth birthday on July 23, 1972.

4. Notice has been given the Complainant by the Board of Retirement of the Commonwealth that he must retire on that date in accordance with Chapter 32, Section 5(1)(a) of the General Laws of the Commonwealth. A copy of said notice is appended to this Complaint and marked "A". Copies of the noted State Statutes are appended hereto and marked "B".

5. The Complainant is a member of the uniformed branch of the State Police appointed under General Laws, Chapter 22, Section 9(a) and classified in Group 3.

6. By virtue of this classification, the Complainant's retirement is governed by General Laws, Chapter 32, Section 26 (3)(a), the last sentence thereof. This sentence is as follows:

"Any member in service classified in Group 3 who is an officer appointed under section nine A of

chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs."

7. The Complainant avers that the application of the statute compelling his retirement is arbitrary and capricious and denies him equal protection with others of the same class in his employment in that:

(a) Men have been employed by the State Police, taken a leave of absence of many years, and returned to the force and continued their employment up to age 65 because they have not completed their 20 years service.

(b) Detectives in the State Police who perform similar functions as the uniformed branch are permitted to continue in their employment under General Laws, Chapter

32, Section 26 (3) to the age of 65.

(c) Women in the State Police by virtue of an exception in General Laws, Chapter 22, Section 9 A are permitted to continue their employment beyond the age of 50.

8. The Complainant believes, and therefore avers, that the application of General Laws, Chapter 32, Section 26 (3) (a) to force his retirement at age 50 deprives him of his equal rights to employment with others of the same class and is, therefore, unconstitutional.

9. The Complainant avers that such forced retirement will cause irreparable damage by preventing him from accumulating more years of service for his pension benefits, loss of pay and increase of life and health insurance costs.

Wherefore, the Complainant demands:

1. Pursuant to the provisions of U.S.C. Title 28, Section 2284 (3) that this Honorable Court grant a temporary restraining order preventing the Board of Retirement from invoking General Laws,

Chapter 32, Section 5(1)(a) and General Laws, Chapter 32, Section 26(3)(a) to cause the loss of his position in the State to the Complainant, thus preventing irreparable damage to said Complainant.

2. That this Honorable Court convene a three judge court in accordance with the requirements of U.S.C. Title 28, Sections 2281 and 2284 to determine the constitutionality of General Laws, Chapter 32, Section 26, (3)(a) as said statute affects the rights of the Complainant.

3. That after a hearing on the merits to permanently restrain the Board of Retirement from invoking General Laws, Chapter 32, Section 5(1)(a) and Chapter 32, Section 26(3)(a) to cause the retirement of the Complainant until such time as the equal protection of those laws are extended to the Complainant as well as others in his own class.

Respectfully submitted,

/s/

Attorney for Complainant

[JURAT OMITTED IN PRINTING]

[The Memorandum and Order of the District Court dated July 21, 1972 is printed in a separate appendix to the Jurisdictional Statement at pages 1-8.]

[The Judgment of the District Court dated July 26, 1972 is printed in a separate appendix to the Jurisdictional Statement at page 9.]

[The Memorandum and Order of the Court of Appeals is printed in a separate appendix to the Jurisdictional Statement at page 10.]

[TITLE OMITTED IN PRINTING]

MOTION TO DISMISS

Now comes the defendant Board of Retirement in the above-entitled case and moves this Court to dismiss the complaint. In support of said motion, the defendant states:

1. The complaint fails to state a claim upon which relief can be granted.

2. The complaint fails to suffi-

ciently allege jurisdiction over the subject matter of the complaint.

3. The plaintiff lacks standing.

4. The complaint fails to name any state officer as a party defendant.

By its attorney,

/s/
Terence P. O'Malley
Assistant Attorney General

[CERTIFICATE OF SERVICE OMITTED IN PRINTING.]

[TITLE OMITTED IN PRINTING.]

AMENDED COMPLAINT

The Parties

1. The plaintiff, ROBERT D. MURGIA, is a citizen of the Commonwealth of Massachusetts and a resident of Andover, Essex County, Massachusetts.

2. The defendant, COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT (hereinafter "BOARD OF RETIREMENT") is an administrative agency of the Commonwealth of Massachusetts located at 73 Tremont Street, Boston, Massachusetts, established under the provisions of Section 18, Chapter 10, Massachusetts

General Laws, having jurisdiction of the Retirement System established under the provisions of Chapter 32 of Massachusetts General Laws.

3. The defendant Robert Q. Crane is the State Treasurer of the Commonwealth of Massachusetts and is the Chairman of the BOARD OF RETIREMENT.

4. The defendant Angelo Amato is a member of the BOARD OF RETIREMENT.

5. The defendant J. Joseph Maloney, Jr. is a member of the BOARD OF RETIREMENT.

6. The defendant James W. Callanan is the Executive Secretary of the BOARD OF RETIREMENT.

Jurisdiction

7. This action is brought pursuant to Section 1983, Title 42, United States Code, and the Fifth and Fourteenth Amendments to the Constitution of the United States seeking a permanent injunction restraining the enforcement, operation or execution of an order made by administrative board or commission acting under a state statute. Jurisdiction is conferred upon the Court under Section 1343, Title 28, United States Code. Declaratory and related

injunctive relief are authorized by Sections 2201 and 2202, Title 28, United States Code.

Statement of the Claim

8. Plaintiff was born on July 23, 1922, and reached his fiftieth birthday on July 23, 1972.

9. On April 7, 1948, plaintiff was appointed to be a member of the uniformed branch of the Massachusetts State Police pursuant to Section 9(a) of Chapter 22 of the Massachusetts General Laws. He served with distinction as a uniformed State Policeman and in 1967 attained the rank of Lieutenant Colonel, the highest rank in the uniformed branch of the Massachusetts State Police.

10. As a member of the uniformed branch of the Massachusetts State Police, plaintiff was classified for retirement purposes as Group 3 and was subject to Section 26, Chapter 32 of Massachusetts General Laws which provides in part:

> "Any member in service classified in Group 3 who is an officer appointed under section nine A of Chapter

> twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, which ever last occurs."

11. On May 8, 1972, plaintiff received a letter from the BOARD OF RETIREMENT informing the plaintiff that he would be retired on his fiftieth birthday, July 23, 1972, in accordance with the terms of G.L. c. 32, §3(a). A copy of the letter of the BOARD OF RETIREMENT is appended hereto and made a part hereof as Exhibit A. Copies of the statutes of the Commonwealth of Massachusetts noted in the letter of the BOARD OF RETIREMENT are appended hereto and made a part hereof as Exhibit B. Plaintiff refused to voluntarily retire and commenced this action on July 6, 1972, to prevent his involuntary retirement.

12. On July 23, 1972, plaintiff was involuntarily retired under the provisions of Section 3(a) of Chapter 32 of Massa-

chusetts General Laws, for superannuation because he had reached his fiftieth birthday.

13. At the time of his retirement plaintiff was, and at the present time plaintiff is, in excellent physical and mental health; he was and is fully capable and qualified to remain in his employment as the Lieutenant Colonel of the uniformed branch of the Massachusetts State Police. At present, plaintiff stands ready, willing and able to continue in that employment.

14. The statutes under which the BOARD OF RETIREMENT, its Members and its Executive Secretary acted to involuntarily retire the plaintiff at age fifty regardless of his qualifications to continue in his employment are unconstitutional in that the statutes bear no valid relationship to any state interest in the effective operation of the Massachusetts State Police and are violative of due process in that they create an unwarranted conclusive presumption that the plaintiff is unfit for or incapable of continuing his duties as a member of the uniformed branch of the Massachusetts

State Police because of his age, whereas an individual's ability to continue in his employment after age 50 and prior to the conventional retirement age of 65 is a matter which can only be determined on an individual basis.

15. The statutes under which the BOARD OF RETIREMENT, its members and its Executive Secretary acted to force the plaintiff's retirement at age fifty are unconstitutional because they deny plaintiff equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States in that the classification based upon age is not equally applied to others in the same or similar class because:

(a) A proviso to the statute requires men to serve at least twenty years before being eligible for retirement. On occasion men have been employed by the State Police who have taken a leave of absence of many years and who subsequently returned to the force.

After having achieved 20 years

of service these men were retired. Some of them, at the time of retirement, had reached ages of up to 65.

(b) detectives in the State Police who perform similar functions as the uniformed branch are permitted to continue in their employment under Section 26(3), Chapter 32, Massachusetts General Laws, to the age of 65, and

(c) police officers in the cities and towns of the Commonwealth of Massachusetts, who perform similar functions as the uniformed branch of the State Police are permitted to continue in their employment to age 65 under Section 83A(a), Chapter 32 of Massachusetts General Laws.

16. The statutes under which the defendant BOARD OF RETIREMENT, its members and its Executive Secretary acted to involuntarily retire plaintiff at age fifty are unconstitutional because they

deny plaintiff equal protection of the laws in violation of the Fourteenth Amendment to the Constitution of the United States in that a classification based upon sex is not equally applied because women in the State Police by virtue of an exception in General Laws c. 22, §9A, are permitted to continue their employment beyond the age of 50.

17. The plaintiff has no adequate remedy at law.

WHEREFORE, plaintiff prays that this court:

1. Declare that the statutes under which the defendant BOARD OF RETIREMENT, ITS MEMBERS and its Executive Secretary acted are unconstitutional in that they abridge the plaintiff's right to a determination as to fitness and ability with respect to retirement for superannuation in violation of the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.
2. Declare that the statutes under which the defendant BOARD OF RETIREMENT, its members and its

Executive Secretary acted to involuntarily retire plaintiff at age fifty are unconstitutional in that they deny to the plaintiff the equal protection of the laws with respect to classification based on age and sex in violation of the Fourteenth Amendment to the Constitution of the United States.

3. Order that the plaintiff be restored to his employment as Lieutenant Colonel of the uniformed branch of the Massachusetts State Police with salary as of July 23, 1972.

4. Order that costs of maintaining this action including reasonable attorneys fees be awarded to the plaintiff.

5. Order such other and further relief as this Court may deem just and proper.

ROBERT D. MURGIA
By his attorney,
MOULTON, LOONEY,
MAZZONE, FALK & MARKHAM

By /s/
Robert D. City

15 Broad Street
Boston, Massachusetts
Tel 742-5550

[CERTIFICATE OF SERVICE OMITTED IN PRINTING.]

[EXHIBITS A and B OMITTED IN PRINTING.]

[TITLE OMITTED IN PRINTING.]

ANSWER OF THE DEFENDANTS CRANE, AMATO AND MALONEY AS MEMBERS AND THE DEFENDANT CALLANAN AS THE EXECUTIVE SECRETARY OF THE BOARD OF RETIREMENT OF THE COMMONWEALTH OF MASSACHUSETTS

The defendants answer to the various allegations of the numbered paragraphs of the amended complaint as follows:

1. Admitted.
2. Admitted.
3. Admitted.
4. Admitted.
5. Admitted.
6. Admitted.
7. The allegations of paragraph 7 are conclusions of law and do not require an answer.
8. Admitted.

9. Admitted as to the first and the second sentence except that part of the second sentence which alleges that the rank of Lieutenant Colonel is the highest rank in the Uniformed Branch of the Massachusetts State Police is denied.

10. Admitted insofar as they are allegations of fact and not conclusions of law.

11. Admitted.

12. Admitted.

13. The defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations of paragraph 13 and call upon the plaintiff to prove the same, if material.

14. Insofar as the allegations of paragraph 14 are ones of fact and not conclusions of law, the defendants are without knowledge or information sufficient to form abelief as to the truth of said allegations and call upon the plaintiff to prove the same, if material.

15. a. Denied, except that the first sentence of paragraph 15. a. is a conclusion of law and does not require an answer.

b. Denied insofar as they are allegations of fact and not conclusions

of law.

c. Denied insofar as they are allegations of fact and not conclusions of law.

16. The allegations of paragraph 16 are conclusions of law and do not require an answer.

17. The allegation of paragraph 17 is a conclusion of law and does not require an answer.

FIRST AFFIRMATIVE DEFENSE

And, the defendants further answer that the plaintiff has failed to state a claim upon which relief can be granted.

SECOND AFFIRMATIVE DEFENSE

And, the defendants further answer that the Court lacks jurisdiction over the subject matter of the complaint.

THIRD AFFIRMATIVE DEFENSE

And, the defendants further answer that the plaintiff lacks standing.

By their attorney,

/s/

Terence P. O'Malley
Assistant Attorney General

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REQUEST FOR ADMISSION UNDER RULE 36

Plaintiff Robert D. Murgia requests the defendants in the above-entitled cause, on or before April 3, 1974, to make admissions, for the purposes of this action only and subject to all pertinent objections to admissability which may be interposed at the trial, to each of the statements set forth in a document titled "Proposed Agreed Statement of Facts" which has been attached hereto, made a part hereof and marked "A."

ROBERT D. MURGIA

By his attorneys,

MOULTON, LOONEY, MAZZONE, FALK & MARKHAM

By_____
Robert D. City

[CERTIFICATE OF SERVICE OMITTED IN PRINTING.]

[TITLE OMITTED IN PRINTING.]

PROPOSED STATEMENT OF FACTS

1. The plaintiff Robert D. Murgia is a citizen of the Commonwealth of Massa-

chusetts and a resident of Andover, Essex County, Massachusetts.

2. The defendant Commonwealth of Massachusetts Board of Retirement (hereinafter Retirement Board) is an administrative agency of the Commonwealth of Massachusetts located at 73 Tremont Street, Boston, Massachusetts, established under the provision of G.L. c. 10 §18 and is charged with the administration of the Retirement System of the Commonwealth of Massachusetts established under the provisions of G.L. c. 32.

3. The defendant Robert Q. Crane is the Chairman of the Retirement Board and the defendants Angelo Amato and J. Joseph Maloney are members of the Retirement Board. James W. Callanan is the Executive Secretary.

4. The action is brought pursuant to 42 U.S.C. §1983 and the Fifth and Fourteenth Amendments to the Constitution of the United States.

5. Jurisdiction over this matter is conferred upon the Court under the provisions of 28 U.S.C. §1343.

6. Declaratory and related relief are authorized by 28 U.S.C. §§2201-2202.

7. The Massachusetts State Police is a division of the Department of Public Safety and is created under the provisions of G.L. c. 22.

8. Within the Massachusetts State Police there are two branches, the Uniformed Branch created under the provisions of G.L. c. 22 §9 and 9A, the Detective Branch created uneer the provisions of G.L. c. 22 §6.

9. The Lieutenant Colonel is the second senior commissioned officer in the Uniformed Branch of the Massachusetts State Police and serves directly under the Commissioner of Public Safety who is also the senior officer.

10. The Uniformed Branch is divided into five bureau commands: Eastern Field Operations, Western Field Operations, Investigative Services, Administrative Services and Technical Services. Approximately 80% of the personnel of the Uniformed Branch are assigned to Field Operations. Each command is in turn subdivided into units.

11. At present there are approximately 880 members of the Uniformed Branch of the Massachusetts State Police including

approximately 137 assigned to the Massachusetts Turnpike Authority and the Massachusetts Port Authority.

12. A person may enlist initially as a member of the Uniformed Branch of the Massachusetts State Police for a term not exceeding three years upon obtaining satisfactory scores on a written examination and passing an enlistment physical examination.

13. After serving a term in the Uniformed Branch of the Massachusetts State Police, a member may reenlist for a second term and thereafter for subsequent terms until he reaches the age of fifty. He may reenlist over age fifty only if he does not have twenty years of service in the Uniformed Branch.

14. By administrative practice the enlistment and re-enlistment terms have been set at two years.

15. There are provisions for the temporary appointment of troopers to the Uniformed Branch of the Massachusetts State Police.

16. Members of the Uniformed Branch of the Massachusetts State Police are not subject to the Civil Service Law and

Rules; members of the Detective Branch are subject to the Civil Service Law and Rules.

17. No person who has not reached his twenty-first birthday nor any person who has passed his thirtieth birthday may be enlisted for the first time as an officer of the Uniformed Branch of the State Police, but the maximum age restrictions have been waived or modified on an ad hoc basis to permit over age enlistment on occasion.

18. The maximum enlistment age restrictions do not apply in the case of the enlistment of women.

19. Members of the Uniformed Branch of the Massachusetts State Police are given physical examinations as part of their application for re-enlistment. This examination is called a re-enlistment physical examination.

20. No officer appointed to the Uniformed Branch may be denied re-enlistment if he has served satisfactorily for six years or more, provided he has passed the re-enlistment physical examination.

21. Members of the Uniformed Branch of the Massachusetts State Police over

the age of forty are given annual physical examinations.

22. Members of the Uniformed Branch of the Massachusetts State Police over age fifty are given annual physical examinations.

23. The requirements for the enlistment, re-enlistment and annual physical examination are set forth in Exhibit I of the Agreed documents. The requirements for each type of examination are essentially similar.

24. The failure of a member or candidate to meet the physical examination requirements in any respect is called a defect.

25. Defects may be of a permanent or temporary nature and are analyzed by the Surgeon General of the Massachusetts State Police to determine whether or not the defect is one which would impair the individual's ability to perform his duties as a member of the Uniformed Branch of the Massachusetts State Police.

26. If the Surgeon General determines the individual's defect to be one which would not impair the individual's ability to perform his duties as a member of the

Uniformed Branch of the Massachusetts State Police, the individual is not disqualified from enlistment or re-enlistment.

27. If the Surgeon General determines the individual's defect to be one which would impair the individual's ability to perform his duties as a member of the Uniformed Branch of the Massachusetts State Police this fact is reported to the Commissioner of Public Safety who may not permit the member to enlist or re-enlist.

28. No member may be discharged for failure to pass the physical examination prescribed by the Rules and Regulations of the Uniformed Branch, but shall continue to be engaged as such officer with duties adapted to his physical condition.

29. Members may re-enlist in the Uniformed Branch after discovery of a defect and failure to pass the physical examination provided the Commissioner of Public Safety waives the physical examination requirements.

30. In 1973 there were approximately 12 officers serving in the Uniformed Branch of the Massachusetts State Police who had waivers on disqualiftying [sic] physical defects in connection with re-enlistment.

31. The Uniformed Branch of the Massachusetts State Police is organized in a para-military fashion. The order of ranks and grades of the Uniformed Branch and the number of men in each is as follows: Colonel (1), Lieutenant Colonel (1), Major (5), Captain (14), Lieutenant (32, 1 woman), Staff Sergeant (56, 29 woman), Sergeant (54), Corporate (68), and Trooper (c. 650).

32. The duties and responsibilities of members of the Uniformed Branch of the Massachusetts State Police are set forth in the Rules and Regulations of the Massachusetts State Police Uniformed Branch and particularly Rule 5 thereof; General Orders, Special Orders, Circular Letters, Memoranda and Troop Orders.

33. The primary duty of the members of the Uniformed Branch of the Massachusetts State Police is the maintenance of Law and Order, the prevention and detection of crime and protection of life and property and the apprehension of violators of law.

34. The duties assigned to the members of the Uniformed Branch of the Massachusetts State Police vary according to the

members rank and the Bureau to which they are assigned. The duties assigned to the members of the Uniformed Branch of the Massachusetts State Police do not vary depending upon the members age. Each member is required to perform his assigned duties regardless of age.

35. The general responsibilities of the Lieutenant Colonel are to assist the Commissioner of Public Safety in the administration of the Uniformed Branch of the Massachusetts State Police.

36. Specific responsibilities assigned to various members of the Uniformed Branch of the Massachusetts State Police, other than Lieutenant Colonel, and others in administrative positions include road patrolling, investigation of crimes, and apprehension of criminals, preparation and prosecution of court cases, maintenance and restoration of order in civil disturbances and prison disorders, and technical laboratory services. Members of the Uniformed Branch are subject to twenty-four hour call to respond to emergency duty.

37. The duties of the Detective Branch of the Massachusetts State Police include

the investigation of major crimes and criminal activities, the detection and arrest of criminals, the collection of evidence and assistance in the preparation and prosecution of cases in Court.

38. Certain duties of the Detective Branch and the Uniformed Branch of the Massachusetts State Police are similar.

39. The primary duties of the police officers of the cities and towns of the Commonwealth of Massachusetts include the prevention and detection of crime, road patrolling, investigation of crimes and apprehension of criminals and preparation and prosecution of Court cases.

40. Certain duties of the police officers of the cities and towns of the Commonwealth of Massachusetts and the Uniformed Branch of the Massachusetts State Police are similar.

41. Members of the Uniformed Branch of the Massachusetts State Police may be promoted to the grades as non-commissioned officers, lieutenant and captain when vacancies occur in those ranks based upon the members performance on a competitive examination, performance evaluation reports, oral interviews in the case of

lieutenants and captains only and longevity in service.

42. To be eligible for promotion to any of the following grades the member must have completed the following periods of service in the Uniformed Branch: corporal - four years; sergeant - six years; staff sergeant - eight years; lieutenant - ten years; captain - twelve years; and staff captain - fourteen years.

43. Appointment to the grade of Lieutenant Colonel is made by the Commissioner from members in the next subordinate grade and appointment to the grade of Major is made by the Commissioner from members in the next subordinate grade.

44. Promotion is not related to physical condition and no physical examination is required for promotion.

45. No member is required to seek promotion and no member is required to retire if he fails to obtain a promotion.

46. A member of the Uniformed Branch of the Massachusetts State Police may retire with full retirement benefits after twenty years of service.

47. A member of the Uniformed Branch of the Massachusetts State Police, who has twenty years of service must retire

upon reaching age 50.

48. A member of the Uniformed Branch of the Massachusetts State Police who does not have twenty years of service may not retire at age fifty but must serve until he completes twenty years of service to be eligible for full retirement benefits.

49. On occasion members have taken leaves of absence with the approval of the Commissioner or have resigned for a period of time and then rejoined the Uniformed Branch with the result that members may not complete twenty years of service until after reaching age fifty.

50. At present, on members of the Uniformed Branch of the Massachusetts State Police is over age fifty and a second will be over the age of fifty when he becomes eligible for retirement. There is a female member of the Uniformed Branch of the Massachusetts State Police over the age of fifty.

51. G.L. c. 32 s 26(3)(a) which requires members of the Uniformed Branch of the Massachusetts State Police to retire at age fifty or upon the expiration of twenty years service results in a force

in which all but a few members are under fifty years of age.

52. The performance of the duties of Massachusetts State Police, especially in the Field Functions, such as road patrolling and maintaining order at civil disturbances, may require a high degree of physical exertion which becomes increasingly more difficult to perform with advancing age.

53. In two samples of the general male population of the Commonwealth of Massachusetts - ages 20 - 25 and ages 45 - 50, a greater percentage of the age 50 sample will be unable to perform the physical activity required of the Uniformed Branch of the Massachusetts State Police than in the case of the age 25 sample.

54. In two samples of the general male population of the Commonwealth of Massachusetts - ages 45 - 50 and ages 50 - 55, there is no substantial difference in the percentage of each group which would be unable to perform the physical activity required of the Uniformed Branch of the Massachusetts State Police.

55. To qualify to perform the duties of the Uniformed Branch of the Massachusetts

State Police, a member must be found physically fit. When a member passes his re-enlistment or annual physical, he is found to be qualified to perform all of the duties of the Uniformed Branch of the Massachusetts State Police.

56. In two samples of the members of the Uniformed Branch of the Massachusetts State Police ages 21 - and ages 45 - 49 who have been given re-enlistment and/or annual physical examinations and who are not serving under waivers of disqualifying physical defects, there is no difference in the percentage of each group which is able to perform the physical activity required of the Uniformed Branch of the Massachusetts State Police; all members are able to perform all of the duties of the Uniformed Branch.

57. There is no necessary, absolute or certain relationship between a given individual members age and his ability to perform the physical activity required of the Uniformed Branch of the Massachusetts State Police.

58. An individual members ability to perform the physical activity required of the Uniformed Branch of the Massachusetts

State Police varies with his physical condition and his age.

59. Any individual member of the Uniformed Branch of the Massachusetts State Police whose age is fifty years or more may be capable of performing the physical activity required of the Uniformed Branch of the Massachusetts State Police depending upon his individual physical condition.

60. A members physical condition as it relates to his ability to perform the duties of the Uniformed Branch is determined at annual and/or re-enlistment physical examinations; members who pass the physical examination are determined able to perform the duties of the Uniformed Branch.

61. Members under age fifty or who are fifty or over but who have less than twenty years of service and who fail to pass the physical examinations may be retired for disability or may be continued in service under a waiver and assigned duties adapted to their physical condition.

62. There are members of the Uniformed Branch serving under waivers who are not capable of performing all of the duties of the Uniformed Branch and who must be assigned special duties.

63. Members who pass the physical examinations and are fully qualified to continue in service must retire if they are fifty years of age and have twenty years of service.

64. Members who pass the physical examination and are fully qualified to continue in service need not retire if they are fifty years of age or over but do not have twenty years of service.

65. There are members serving in the Uniformed Branch of the Massachusetts State Police whose ages are over fifty and who perform all of the duties required of the Uniformed Branch.

66. As a member's age increases the statistical liklihood of incurring a disease or disability which would render the member incapable of performing the physical activity required of the Uniformed Branch increases.

67. The statistical liklihood of a member incurring a disease or disability which would render him incapable of performing the physical activity required of the Uniformed Branch increases gradually from age 20 through age 40, then at an increased rate from 40 to age 65

and thereafter more sharply.

68. There is no significant statistical increase in a members liklihood to incur or to have incurred an incapacitating disease or disability at age 50 as compared to the ages immediately preceeding or following age 50.

69. Members of the Detective Branch of the Massachusetts State Police who have twenty years of service are retired at age fifty-five unless certified annually that the mental and physical condition of the officer is such that he should continue in his duties.

70. If found qualified, a member of the Detective Branch of the Massachusetts State Police may continue in his employment until he reaches age sixty-five.

71. Members of the police department of the cities and towns of the Commonwealth of Massachusetts are retired at age sixty-five.

72. Mandatory retirement at age fifty of members of the Uniformed Branch tends to create vacancies in the various ranks sooner and more often than would be the case with a later retirement age.

73. Vacancies in ranks caused by

mandatory retirement at age fifty are filled by promoting members of the Uniformed Branch.

74. Robert D. Murgia was born on July 23, 1922.

75. Robert D. Murgia was appointed a member of the Uniformed Branch of the Massachusetts State Police pursuant to G.L. c. 22 §9(a), on April 7, 1948.

76. On March 1, 1967 Robert D. Murgia was appointed Lieutenant Colonel, the second highest rank in the Uniformed Branch of the Massachusetts State Police.

77. Robert D. Murgia served satisfactorily in every rank and office he held in the Uniformed Branch of the Massachusetts State Police.

78. At his physical examination in March 1972, Robert D. Murgia was found to be fully qualified to continue his duties as a member of the Uniformed Branch of the Massachusetts State Police.

79. On May 8, 1972 Robert D. Murgia received a letter from the Retirement Board informing him that he would be retired on his fiftieth birthday for superannuation in accordance with the terms of G.L. c. 32 §3(a) because he had

more than twenty years of service in the Uniformed Branch of the Massachusetts State Police.

80. On July 23, 1972 Robert D. Murgia was mandatorily retired under the provisions of G.L. c. 32 §3(a) for superannuation because he had reached his fiftieth birthday.

[TITLE OMITTED IN PRINTING.]

RESPONSE OF DEFENDANTS TO REQUEST FOR ADMISSIONS

1. Admitted.
2. Admitted.
3. Admitted.
4. Denied.
5. Denied.
6. Denied.
7. Admitted.
8. Admitted.
9. Admitted.
10. Admitted.
11. Admitted.
12. Admitted with the qualification that the person must also pass an agility test and an oral interview.

13. Admitted.
14. Admitted.
15. Admitted.
16. Admitted.
17. Admitted with the qualifications that, by virtue of St. 1973, c. 925, "twenty-first birthday" should read "nineteenth birthday" and that the only variations from the age enlistment requirements were those specified in the notarized letter of John F. Kehoe, Jr., Commissioner of Public Safety, dated July 20, 1972 (agreed Documents, L)
18. Denied. The maximum age restriction has been administratively applied to women since the general entrance examination has been opened to women. That restriction did not apply when women had previously been enlisted as "policewomen" under Rule 5, 18(e) of the Rules and Regulations of the Uniformed Branch of the State Police.
19. Admitted.
20. Admitted.
21. Admitted.
22. Admitted
23. Admitted.
24. Admitted.

25. Admitted.
26. Admitted.
27. Admitted
28. Admitted with the qualification that such members are subject to involuntary retirement for disability.
29. Admitted.
30. Denied. The approximate number is 12 such officers.
31. Admitted.
32. Admitted.
33. Admitted.
34. Admitted.
35. Admitted.
36. Denied. The Lieutenant Colonel and other senior officers in command positions can not be separately categorized as officers in administrative positions. For example, these officers must and do perform field functions in such cases as the maintenance and restoration of order in civil disturbances and prison disorders. The last sentence is admitted.
37. Admitted.
38. Admitted.
39. Denied. The primary duties of municipal police officers are set forth in Mass. G.L. c. 41, §98.

40. Admitted.
41. Admitted.
42. Admitted with the qualification that the last-named position has been abolished.
43. Admitted.
44. Denied. While no physical examination is specifically required for promotion, considerations as to physical capability would generally be considered during the promotion process described in paragraph 41.
45. Admitted.
46. Admitted with the qualification that the retirement benefits are those prescribed in G.L. c. 32, §26 (3)(c).
47. Admitted.
48. Admitted with the same qualification as in paragraph 46.
49. Admitted with the qualification that the full extent of such occurrences is that described in the notarized letter of John F. Kehoe, Jr., Commissioner of Public Safety, dated July 20, 1972 (Agreed Documents, L)
50. Admitted.
51. Admitted.
52. Admitted.
53. Admitted.
54. Denied.

55. Admitted.
56. Admitted with the qualification that the former group is more capable than the latter group.
57. Denied. A member's ability decreases with age.
58. Admitted.
59. Admitted.
60. Admitted.
61. Admitted.
62. Admitted.
63. Admitted.
64. Admitted.
65. Denied. There is one woman who performs the duties of a "policewoman" and one man presently serving. These two individuals are those referred to in the notarized letter of John Kehoe, Jr., Commissioner of Public Safety, dated July 20, 1972 (Agreed Documents, L).
66. Admitted.
67. Admitted.
68. Denied. The increase is significant.
69. Admitted as a description of the relevant statutory procedure.
70. Admitted.
71. Admitted.
72. Admitted.

73. Admitted.
74. Admitted.
75. Admitted.
76. Admitted.
77. Admitted.
78. Admitted.
79. Admitted.
80. Admitted.

By their attorney,

/s/

Terence P.O'Malley
Assistant Attorney
General

[CERTIFICATE OF SERVICE OMITTED IN PRINTING.]

[TITLE OMITTED IN PRINTING.]

AFFIDAVIT OF JOHN F. KEHOE, JR.

I, John F. Kehoe, Jr., being duly sworn, hereby depose and say:

1. I am the Commissioner of Public Safety, the executive and administrative head of the Department of Public Safety. I have held this position since being appointed by the Governor on September 1, 1971. Under my immediate charge within the Department is the Division of State

Police, which consists of the Uniformed Branch and the Detective Branch.

2. Prior to my appointment as Commissioner, I was employed by the Federal Bureau of Investigation for twenty-nine years. My last assignment with that Bureau was as Supervisor, Organized Crime Section, Boston, Mass.

3. The Uniformed Branch of the Massachusetts State Police is mandated by statute "to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth," Mass. G. L. c. 22, §§ 9, 9A. This mandate is executed principally by restoring and maintaining order in prison and civil disorders, responding to emergencies and natural disasters, patrolling highways in marked cruisers, investigating crimes and apprehending criminals.

4. The physical capability of the uniformed officer is of critical importance to the effective performance of these duties. In order to effect an arrest with the least amount of force, to rescue a drowning person, to extricate an individual from a smashed automobile, to

contain a disorderly assembly, or to perform any number of public safety objectives, a uniformed officer must be able to react swiftly and strongly.

5. On the basis of my own personal experience in law enforcement and my observation of uniformed officers responding to emergency situations, it is my opinion that younger officers are generally more capable than are older officers in performing physical functions.

6. The duties of the detectives include the investigation of crimes, the detection and arrest of criminals, the collection of evidence, and the assistance in the preparation of cases in court. While some members of the Uniformed Branch may be assigned these duties, in no event are the detectives assigned the duties of the Uniformed Branch not here mentioned.

7. In the course of an investigation, members of the Uniformed Branch may perform undercover, beard or disguise work. The detectives do not perform such work.

8. Detectives may temporarily be assigned to conduct investigations with respect to licensing functions by the

Department. Presently some are conducting investigations with respect to the licensing of warehouses.

9. Apart from the supervisory responsibilities of the Captains of Detectives, state police detectives do not perform command functions.

10. Detectives drive in unmarked cars, wear civilian clothes and are regularly scheduled to work on an eight-hour, thirty-five-minute day shift, Monday through Friday, with an additional day off every three weeks.

11. Between the dates of November, 1967 and December, 1973, no detective retired for a service-connected disability. Only one detective retired for an ordinary disability.

12. In accordance with departmental policy established by me, no leave of absence has been or will be granted which did or would allow a uniformed officer to serve in the Uniformed Branch beyond the age of fifty.

13. Since enlistment in the Uniformed Branch as a trooper, as contrasted with "policewoman," has been opened to women, the maximum age restriction of twenty-nine

has been administratively applied to women. The women presently serving in the Uniformed Branch enlisted as and perform the functions of "policewomen."

14. While the Uniformed Branch and municipal police departments seek to accomplish similar law enforcement objectives, they have distinct operational characteristics. The Uniformed Branch is a relatively small force designed to cover the entire state. As a result, a state police cruiser is generally manned by only one officer, must cover a wide geographical area and may be as much as thirty minutes away from back-up assistance in case of an emergency. On the other hand, a municipal cruiser is generally manned by two officers, must cover a limited geographical area and is generally only a few minutes away from back-up assistance.

15. The Uniformed Branch is the ultimate back-up force for the municipalities in the Commonwealth.

16. It is good law enforcement policy to assign civilians rather than uniformed officers to administrative duties wherever possible. This practice frees more

officers for field or patrol duty. For example, civilians are employed as radio dispatchers for the Uniformed Branch.

17. Police forces with higher retirement ages than that of the Uniformed Branch tend to assign administrative duties to older officers. For example, uniformed officers are generally assigned as radio dispatchers for municipal police departments.

18. The only individuals who have served beyond the age of fifty in the Uniformed Branch are those specified in my notarized letter dated July 20, 1972.

Signed under the pains and penalties of perjury this second day of April, 1974,

/s/
John F. Kehoe, Jr.

[JURAT OMITTED IN PRINTING.]

[CERTIFICATE OF SERVICE OMITTED IN PRINTING.]

[TITLE OMITTED IN PRINTING.]

DEPOSITION OF DR. THOMAS ROYLE DAWBER, taken on behalf of the Plaintiff, pursuant to Notice of Taking Deposition, before Carl H. Daitch, Certified Shorthand Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the offices of Moulton, Looney, Mazzone, Falk & Markham, Esqs., 15 Broad Street, Boston, Massachusetts, on Monday, February 25, 1974, commencing at 2:14 o'clock p.m.

PRESENT:

Moulton, Looney, Mazzone, Falk & Markham, (by: Gerald F. Lucey, Esq., of counsel,) 15 Broad Street, Boston, Massachusetts, for the Plaintiff.

Robert H. Quinn, Attorney General, (by: Terence P. O'Malley, Assistant Attorney General,) 373 State House, Boston, Massachusetts, for the Defendant.

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EXHIBITS

No.	Description	For Id
1	Clipping entitled "State Trooper Saves Driver Trapped in Truck in River" from the January 10, 1974, edition of the Boston Globe	16

[ALL OF THE PRECEDING NUMBERS REFER TO PLACEMENT AND PAGINATION IN THE ORIGINAL DEPOSITION.]

STIPULATIONS

It is stipulated and agreed by and between counsel for the respective parties that the reading and signing of the deposition by the witness and the certification, sealing and filing thereof is hereby waived.

All objections, except as to form of questions, are reserved for the time of trial.

DR. THOMAS ROYLE DAWBER, having been duly sworn, testified as follows in answer to direct interrogatories by Mr. Lucey:

Q. Doctor, would you state your name and residential address for the record, please?

A. Thomas Royle Dawber, I live at 39 Sheridon Road in Wellesley Hills.

Q. What is your occupation, Doctor?

A. I am a physician.

Q. Will you please state your educational background for the record, commencing with your undergraduate work and bringing us through all of your internship and residencies?

A. I am a graduate of Haverford College, Haverford, Pennsylvania, with a Bachelor of Arts Degree, 1933.

A graduate of Harvard Medical School, M.D. in 1937.

[4]

I also have a Master's Degree in Public Health from the Harvard School of Public Health in 1958.

I was a career officer in the United States Public Health Service from 1938 through 1965.

I was an intern in the Public Health Service, and then had clinical training in the Public Health Service Hospitals.

I am certified as a Board Certified Internist by the American Board of Internal Medicine.

I am a Fellow of the Massachusetts Medical Society, a Fellow of the American College of Physicians, a Fellow of the American Heart Association, a Fellow of the American College of Angiology, a Fellow of the American College of Chest Physicians.

I am the author of some two or three hundred papers on various aspects of cardiovascular epidemiology, and a co-author of a book on diseases of the chest.

Do you want any statement about what I am currently doing?

Q. I will ask you that in a minute, Doctor.

Doctor, could you explain the term "angiology"?

A. It has to do with blood vessels.

Q. Doctor, are you presently engaged in the practice of medicine?

A. Yes.

I am Associate Professor of Medicine at the Boston University School of Medicine. I am head of a section in epidemiology and preventive medicine in the Evans Department of Medical Research.

I specifically conduct a study

in Framingham relative to factors that contribute to the development of coronary disease, hypertension, stroke and other vascular diseases.

I am also consultant and actively engaged in the normaltive aging study with the Veteran's Administration.

I am also consultant to the Public Health Service studying coronary diseases in Yugoslavia.

I am a consultant to the World Health Organization.

Q. Doctor, could you describe the scope of what you have referred to as the Framingham Heart Study, telling us approximately how many years it has been in progress and what it seeks to define?

[6]

A. This is a study of a general population of adults begun in 1950 in the Town of Framingham to determine what are the characteristics of those individuals who later turn out to develop evidence of coronary heart diseases, stroke and other cardiovascular diseases.

This is in a population of people who are originally well, free of any evidence of disease, what are the

characteristics of what determine the eventual outcome of these individuals.

Q. Could you tell us exactly what part you play in this study, Doctor?

A. I was Director of the study from its beginning up through 1965 as a career officer in the United States Public Health Service.

I then retired from the Public Health Service and went to Boston University School of Medicine, and because the government decided to phase out some of the activities in Framingham, I undertook, with my associates at Boston University, to raise some private funds through grants and other mechanisms to continue the actual clinical investigation; so, it is now a joint project of the National Institute of Health and Boston University.

Q. You are still actively engaged in that?

[7]

A. I am a Director of the Boston University aspect of this.

Q. In addition to the activities that you have just enumerated, Doctor, do you see patients in the practice of medicine?

A. I currently do not see any

private patients.

I spent the first twelve years of my medical career actively engaged in the clinical practice of medicine. I was Chief of Medicine at the Brighton Marine Hospital towards the end of this; so, for a number of years I have not seen private patients for a fee. I have been employed by either the government or by Boston University.

I do private consulting for insurance companies with regard to insurance underwriting, however, as to what is the risk of a disease of people with various abnormalities, and I do other private consulting, but I do not have an active private practice.

Q. Again, Doctor, you mentioned that you are an Associate Professor of Medicine at Boston University School of Medicine?

A. That's right.

Q. This is in the area of internal medicine?

A. This is in the Department of Medicine.

[8]

Q. Doctor, are you here this afternoon testifying pursuant to a subpoena

that was issued from the Clerk's Office on behalf of Colonel Robert D. Murgia?

A. I am.

Q. Are you aware of the fact that my office represents Colonel Murgia in a law suit?

A. I am.

Q. Prior to coming here today, have you had occasion to meet Colonel Murgia?

A. Yes.

Q. Was this in the context of a physical examination that you conducted?

A. Yes, it was.

Q. Will you please describe for the record in full and complete detail what the examination consisted of and what, if anything, you found?

A. I was in telephone contact with Mr. Murgia and originally has asked him to meet me in my office in Framingham where I could do a somewhat more detailed examination, such as get an electrocardiogram, and it was not possible for him to do that, and I asked him to see me in my office at Boston University School of Medicine.

Q. What date was this, Doctor?

A. It was about two weeks ago

that I saw him in my office. At that time, I asked him, first of all, questions

[9]

with regard to a medical history:

His family history indicates that his father is dead, having died at the age of 78, cause not stated. His mother is alive, she is now 78. He has two brothers, one older and one younger, who are apparently in good health.

A detailed review of systems -- of the neurologic system, cardiovascular and so on -- failed to reveal any history of any illness which he has had.

He denied specifically a number of symptoms, such as shortness of breath, chest pain on exertion, any visual difficulties, hearing difficulties or anything which I could obtain. He stated that he had lost only about four days because of illness during his twenty-four years in the State Police.

He apparently had an annual physical exam yearly, the last one being in April 1972, and he was retired in July 1972. He denied any sumptoms, either prior or after that examination, and he stated that he had not been retired because

of any physical findings on the April
[10]
1972 examination.

I then examined Colonel Murgia:

His age at the present time is 51. He appeared to me to be a man somewhat younger than 51.

He had an athletic build. He obviously is a man who has done hard physical activity and is used to a great deal of activity.

Again, there was no evidence of any defect in vision, hearing, the other senses.

Examination of his heart disclosed no murmurs, no abnormal rhythms, his lungs were clear to examination; abdomen, extremities were negative.

On this examination, which I again say was one conducted in my office without laboratory work or other added investigation, such as an electrocardiogram, the only finding of note was his blood pressure, which was slightly elevated; that is, the systolic pressure was about 145 and the diastolic pressure about 98.

On further questioning about Colonel Murgia at this time, he stated --

I specifically asked him did he realize that his blood pressure was somewhat higher than usual, and he stated on many examinations which he had had the physician had frequently measured the blood pressure and
[11]
then asked him to rest a while before the pressure was repeated, which would suggest that possibly this borderline kind of blood pressure which he shows had been present and was not something new.

At this time I would say that he was in apparently good health, that the only -- he would be on the upper level of blood pressure range for his age.

Q. Doctor, from this examination did you form any conclusions as to ghe general soundness of Colonel Murgia's health?

A. I would conclude that he was generally in good health.

Q. As a result of your physical examination of Colonel Murgia and your findings, would you be inclined to withhold your approval for his engagement or participation in any particular forms of physical activity, or would you be inclined to give general approval?

A. I would be inclined to give

general approval.

As I indicated, his blood pressure was a little up. If he were a patient of mine, I would want to see him a number of times to recheck those pressures. I would make no move with regard to those measurements at this time. I would want to see him several times and

[12]

see what his blood pressure did under several circumstances. I wouldn't be concerned about it, however.

Q. Doctor, prior to coming here today did I send some materials to you in the mail for your perusal?

A. Yes.

There was some material pertinent to the activities of the State Police.

Q. Dr. Dawber, would it be fair to say that the materials that I sent you in the mail included a copy of the Complaint on file in this case, a copy of Rule 1 entitled "Definitions", that portion of Rule 5 entitled "Duties" setting forth the duties of a "Trooper" and designated as Rule 5.14, and a copy of Rule 10 of the General Rules Applicable to Members of the

Uniformed Branch of the State Police?

A. I believe that is what I received.

MR. LUCEY. Mr. O'Malley, may we stipulate that the documents that I have mailed to Dr. Dawber, which he has reviewed before coming here today, are the same documents designated Exhibit 1, the Complaint; Exhibit 2, Rule 5.14; and Exhibit 3, Rule 10, these exhibits being the same exhibits that were marked at the deposition of Dr. Silva, which we took a couple of weeks ago?

MR. O'MALLEY. Yes.

Q. Dr. Dawber, as a result of reviewing these exhibits, which I now refer to as Exhibits 1, 2 and 3, are you generally aware that this case in which you are giving testimony involves the involuntary retirement on July 23, 1972, of Colonel Murgia from his position as Colonel and head of the Uniformed Branch of the State Police?

A. Yes, I am.

Q. Are you aware that his involuntary retirement was pursuant to a provision of the Massachusetts General Laws which requires that members of the Uniformed Branch

of the State Police retire upon attaining age 50 or upon the expiration of 20 years of service, whichever last occurs?

A. Yes, I am.

I gathered from talking to Colonel Murgia that the specific age at which people had retired had been somewhat variable, but I presume that that would relate to the time of service.

Q. That would relate to the 20 years, Doctor?

A. That is right.

Q. Doctor, on the basis of Rule 1 of the rules applicable to the Uniformed Branch of the State Police, are you aware of the fact that there are three ranks; the rank of Trooper, which includes male

[14]

members below the grade of Corporal; noncommissioned officers, which include Corporal, Sergeants, and Staff Sergeants; as well as commissioned officers, including Lieutenants, Captains, Majors, Lieutenant Colonels and Colonels?

A. Yes.

I was aware of the general military structure of the State Police.

Q. Doctor, having in mind that the

duties of a member of the Uniformed Branch of the State Police include the protection of life and property, the detection of crime and the apprehension of criminals, do you have a medical opinion as to the type of stress factors involved in these kinds of duties and the effect that these stress factors might have upon an individual?

A. Yes.

In general I am aware of the fact that the State Police may be called upon, particularly the Troopers would be called upon to perform activities which call for excessive physical exertion, also a need to be extremely alert in apprehending prisoners and so on, that these activities could produce considerable stress on individuals who might have to perform them.

There is some difference of opinion as to how much disease may result to such sudden demands for physical activity, but, in general, one would say that such activities would increase the possibility that an individual might, for

[15]

example, have a heart attack or go into sudden congestive heart failure.

Q. Would it be fair to say that these stress factors become more significant as the individual in question becomes older?

A. Yes, it certainly would.

Q. Doctor, having in mind that members of the Uniformed Branch of the State Police are also sometimes assigned to the offices of various district attorneys throughout the Commonwealth of Massachusetts for the performance of investigative duties, are sometimes assigned to other State agencies and departments, including the Attorney General's Office, the Crime Commission, Civil Defense, the New England Organized Crime Intelligence Center and the Community Assistance Program of the Governor's Commission on Law Enforcement and are sometimes assigned to the Governor personally and to other constitutional offices, do you have a medical opinion as to the type of stress factors involved in these types of assignments and the effect that these types of stress factors might have on the body?

A. I think, in general, the stress

[16]

factors would be considerably less in those activities, that they would be very little

more than would be experienced by other people in generally similar occupations.

Q. Doctor, permit me to display to you a clipping which was taken from the Boston Globe on January 10th of 1974, and I would ask that you take a look at this clipping, please, and read it to yourself.

A. All right.

Q. Have you had a chance to read that?

A. Yes.

MR. LUCEY. Subject to Mr. O'Malley's approval, I would like to introduce this into evidence.

MR. O'MALLEY. Certainly.

MR. LUCEY. May it be marked.

(Clipping entitled "State Trooper Saves Driver Trapped in Truck in River" from the January 10, 1974, edition of the Boston Globe was marked Exhibit Number 1 for identification.)

Q. Dr. Dawber, having in mind that members of the Uniformed Branch of the State Police are subject to being called

[17]

upon to act in emergency situations, such as the one described in the clipping marked Exhibit 1, as well as the possibility that a State Trooper might have to, in the

course of his duty, engage in hand-to-hand combat or take steps to quell a prison disturbance or riot or student disturbance or riot, do you have a medical opinion as to the types of stress factors involved in these demanding types of activities and the effect that these stress factors might or might not have on the body?

A. Yes.

The major physical change which occurs with sudden exertion is on the cardiovascular system. There is a marked rise in blood pressure. There is a demand on the heart, as a pump, to function at a much greater demand for blood supply throughout the body.

So, the major effect is on the cardiovascular system, and under such conditions one might expect that if the individual had coronary disease, for example, he might precipitate a case of angina, under a sudden rise in blood pressure he might have a cerebral hemorrhage.

The main effect -- what I am saying is, that it would have an effect on

[18]

the cardiovascular system.

Q. Doctor, in view of the testimony

that you have given here today and in view of the types of activities and their attendant stress factors upon the body, do you have a medical opinion as to whether it can be rationally stated that at a particular age men become physically unable to perform the types of duties or activities that a State Trooper is called upon to perform, and as a result should be retired?

A. Well, I think that very clearly the younger the individual is, the less atherosclerotic changes he has, the less changes in his arterial bed, the less so-called hardening of the arteries he has, the better the blood supply to the heart muscle; therefore, the better he is able to respond to demand.

I think there is no question that the older the individual is, the greater the risk that something might happen to him under those conditions of stress. However, this is an individual -- these changes differ markedly from individual to individual.

In order to evaluate what this risk would be, it is necessary to see the individual and to do a detailed

number of studies to assess what this
[19]
probability or risk might be. It is not possible to do it just on the basis of age, as with a group, although one would admit that at any given age in a group the higher the age the greater the risk would be.

Q. Would it be fair for me to say that on the basis of that answer, that in determining whether or not an individual is able to perform certain duties or activities that it would be appropriate to make a determination, based upon functional age as opposed to chronological age?

A. Yes.

I recognize that it has been considered practicable in many organizations to set arbitrary ages of retirement; most of those ages are usually set in the 60's, as in the military services at which 64 is -- it differs from service to service, for that matter, but is in the 60's, and prior to that time, unless the individual elects, it is based purely on a detailed physical examination, which is the only way to assess for the individ-

ual what his -- his risk of dying or his ability to carry out a given function.

Q. So once we make the distinction between functional and chronological age, then it becomes possible to make a determination on an individual basis; is that correct?

[20]

A. Yes, again with reasonable probability.

None of these test procedures are absolute, in the sense that one can guarantee how long anyone is going to live free of disease.

Q. It is possible?

A. It is possible to come up with a reasonable assessment that most people will accept.

Q. It is possible that if we gave exams on an individual basis, that it might result in a finding that as between two individuals, one age 55 and one age 45, that the individual who is older chronologically might be "younger" on a functional basis?

A. Yes.

I think that is definitely true.

Q. Doctor, do you have a medical opinion as to whether it would be medically sound to say that at some particular age, as a general rule, many men are physically unable to perform activities such as the protection of life and property, the apprehension of criminals or the detection of crime, or that the performance of such duties is so stressful to their bodies that beyond a certain age most men should not engage in or perform these types of duties?

A. It is difficult to make a specific age which one would say this is true for every one, since in any group

[21]

there will be a few individuals who even up into the 80's might be very vigorous physical individuals.

Certainly the number of people who could not perform these functions satisfactorily would increase with age, but again one could only base this on an individual assessment, not on a group assessment, in which case one would be dealing strictly with probabilities.

Q. Harkening back to your earlier testimony, Doctor, you testified you were the Director of the Framingham Heart

Study?

A. Yes.

Q. In the course of this study, have you had occasion to observe at close range individuals in, let us say, the age 40 to age 65 bracket?

A. Yes, I have.

Q. Have you ever had occasion to make any observations as to the aging of the cardiovascular system between the ages of 40 to 50, let us say?

A. Yes.

We studied people who were originally age 30 to 59 back in January of 1950, and these people are now 54 through 83.

[22]

One of the things that one is very impressed with is the rate of aging is certainly markedly different from individual to individual. One sees a certain number of individuals who begin to develop manifestations of coronary heart disease, even in the 30's. This goes up with age, and yet one may see people in the 80s who have absolutely no symptoms of heart disease, who are able to perform hard, vigorous, physical activity, who

engage in very activie sports just as well as many people in the 20;s do.

Our attempts in Framingham is to find out why it is some people develop these disorders early and some do not. We have come up with a good deal of evidence which suggests that we can, on the basis of a number of characteristics of the individual, predict the probability of developing early manifestations of atherosclerotic disease, which is one of the major factors which determines one's physical ability and one's ability to live to a ripe old age, since cardiovascular diseases is the cause of death in over half the population in the United States.

Q. Have you had any occasion to make observations which would permit you to give a medical opinion as to whether or not aging of the cardiovascular system is significant between the ages of 40 or 50 or whether it becomes more pronounced between the ages of 50 or 60 or 60 and 70 or whatever?

A. It is not possible to pick any particular age -- narrow age range in which there is sudden changes in the cardiovascular

system. We are talking about changes that have occurred really in infancy which progress gradually over time and which

[23]

proceed at a much more rapid rate in some individuals than others.

There are other facts that relate to aging than those that affect the cardiovascular system. This is such an important -- the supply of blood to organs, such as the brain, the heart -- this is such an important factor that it entirely outweighs more than anything else that one sees. There are some individuals who age prematurely because of general cellular changes, but, by and large, the biggest factor that we see which causes a disability and early death, early diseases is in the cardiovascular system; that is, there are individuals who, of course, develop arthritic changes who may live a long time disabled because of joint disease, the cause of which we do not know.

In fact, one has to say at the present time we don't know much about the cause of most of the diseases that we think of as diseases of aging, but our

present thinking is, as demonstrated from what we have determined in framingham, that age alone is not the pure factor which causes this and may not be in many instances the important factor.

It used to be thought that arteriosclerotic changes was purely a function of aging. We don't believe that is true now. We believe it is probably

[24]

a metabolic disorder which differs from person to person.

Q. Doctor, having in mind that the statutory provision by which Colonel Murgia involuntarily retired from the Uniformed Branch of the State Police requires retirement at age 50, or which, in his case, required his retirement at the age of 50, on the basis of your knowledge of the physical demands and the stress demands that might be placed upon a State Trooper, do you have any medical opinion as to the rational or rationality of auch a statute.

A. Well, I assume that the rationality of this statute is, that it is assumed that the younger the individual is, the more able he is to respond to the

demands of the job, and that as the individual gets older his ability to do this becomes less. I think that is basically

[25]

true.

On the other hand, it does seem that age 50 is a rather young age in which to arbitrarily conclude that someone is not able to perform these functions. I can understand that in any organiaation, such as in the military, in order to operate to make the system work, you must have a number of young, vigorous individuals in this system and you don't like to overload it with too many elderly people in the system, but obviously there are other functions here such as experience in the job which called for older indivuduals to be in charge of various functions and in order to get this experience obviously these individuals must be older and, therefore, I would assume that there was maybe something not completely rational about getting rid of higher ranking officers at age 50 who presumably have accumulated enough experience to make their judgments more important than possibly some

slight loss of physical ability to respond to demands.

Q. Dr. Dawber, would it be fair for me to conclude from the testimony that you have given to this point, that it is your opinion that aging is an individual matter and that an individual of a certain chronological age might, in fact, have the capabilities of a younger man, in that in a given situation a retirement system to be completely fair would be based upon a medical examination or physical examination of individuals as opposed to retirement taking place at an arbitrarily stated age?

A. Yes.

Assuming that the retirement system was based on whether or not the individual could do the job.

[26]

Q. Given your knowledge of the duties of a State Trooper or a member of the Uniformed Branch of the State Police, if it were not possible to accord a retirement system based solely upon the ability of an individual and it was necessary to designate an arbitrary age, do you have a medical opinion as to what might be a more realistic age than the one enumerated

in the statute that we have discussed here today?

A. I am most familiar with the retirement system in the military where arbitrary retirement because of age is in the 60's -- it is 64 in some of the services and 62 in others. The applicability of this is primarily to officers of higher rank, since obviously they don't have some of the physical demands of enlisted men.

If one looks at disability with age, one sees an increase with age and an increasing rate of disability when

[27]

one goes into the middle 50's or 60's or on into the 70's. There are changes which are occurring probably between 60 and 70 which are occurring at a much faster rate than occurred prior to that time.

I think that age arbitrarily decided for retirement purposes would be appropriate in the 60's.

MR. LUCEY. Thank you very much, Doctor, I have no further questions at this time.

CROSS EXAMINATION

Q. (By Mr. O'Malley) Doctor, if you were going to write a scholarly paper con-

cerning the relationship of age to physical fitness to be a State Police Officer, what kind of investigation would you make concerning the actual requirements for the State Police?

A. Requirements based on a physical examination?

Q. To determine what the physical requirements are.

A. Well, I would be interested in the general state of the health of the individual. I would be particularly concerned about the status of his cardiovascular system, and in this I would probably want to conduct a very intensive evaluation of the cardiovascular system, the changes in the pulse rate with exertion, the electrocardiogram, exercise electrocardiogram to determine whether under conditions of increasing physical demands there was any evidence of impaired coronary blood flow.

I would want tests as regards

[28]

the kidney function, which may also be a function of the cardiovascular system.

I would want certain blood studies done to determine blood cholesterol level, hemoglobin level and so on.

Q. Would you have to make an empirical study of the State Police, in particular, as opposed to an individual?

A. No.

Q. Have you made any studies beyond the review of the rules of the State Police?

A. Study pertaining to what?

Q. Pertaining to their actual physical duties?

A. No.

I am generally aware, as a citizen, as to what they do. I have not done a detailed study of that.

Q. Do you think that would be required to write a very scholarly paper on the subject?

A. Not specifically, unless one had evidence that the State Police were called upon to do heroic feats that many other individuals do not do.

I had a long association with the military, having been an officer in the Public Health Service and being on many retirement boards in the United States Coast Guard. These individuals are called upon to do all kinds of activities of a heroic nature, and I doubt that they are any less strenuous or more strenuous than

that any State Police carries out.

Q. Would mental stress factors be significant?

A. There are claims that various kinds of mental stress are productive of stress.

In my experience there is no good evidence to support this, insofar as cardiovascular disease goes; that is to say, that people who are living under stressful circumstances develop any more hypertension, any more coronary disease, any more stroke than anyone else does.

There are admittedly claims of others that this is true. In my experience we have not observed this to be a fact. We studied this in quite detail in the Framingham study and could find no evidence that this is true.

[30]

Q. For example, if an individual had a strained relationship with his wife, could that be relevant to his chances of suffering from coronary disease?

A. In my experience, this is not a factor.

Q. Would the nature of the strict discipline of the State Police possibly be factor?

A. In my experience, I would think not.

I think one has to recognize that in the State Police one has a situation similar to what one observes in the military. The military, in the peacetime, the life expectancy is better than the average population because of the selection of the individual, and I think it goes with the State Police.

Q. They are not engaged in combat, are they?

A. They are not engaged in combat where bombs are being dropped and so on, but they may be engaged in smaller, lesser wars, let's say.

I think we have to say that in any organization in which there are physical requirements to enter the organization, one gets a selective population which has a better life expectancy, a better probability of remaining free of disease than one finds in the general population.

Q. At what point would a blood pressure indicate hypertension?

[31]

A. That is a very difficult question. Blood pressure is a continuous

variable.

There is no point on the scale in which one can say that the individual goes from being normal-tensive to being hypertensive. Different levels have been used. Some physicians think that the diastolic pressure should be used, others that the systolic pressure should be used and others that both of these should be used.

Most physicians in practice are inclined to move the scale up considerably and take to pressures such as 180 systolic and somewhere around 100 diastolic as the point. Other people who wish to exclude anyone with any elevated pressure would take measures of 140/90 as a measure above which the indivdual has higher blood pressure.

Again, this is a question also of under what circumstances is the pressure taken, how many pressures are taken, has the patient been rested, is this a casual pressure, is it a basal pressure after sedation. It is very difficult; in fact, it is impossible to say that beyond a certain point someone has hypertension.

Q. Is it possible that Colonel Murgia's

blood pressure indications reflect a possi-
[32]
bility that he is suffering from hypertension?

A. Certainly his pressures are above those which one likes to see at his age. In order to assess the importance of these, I indicate that it would be necessary to do a number of repeat examinations to determine really what his blood pressure is, since the pressure I got was a casual pressure obtained as he walked in off the street into my office.

If one were to say what is the probability -- does he have a higher probability of developing excesssively higher blood pressure compared to one with a lower pressure, the answer is yes, he does have that. Just on the measurements which I made I could only make limited observations as to what that risk might be.

Q. So, in your opinion, it could be significant or it could be slight, you cannot be sure?

A. I can't be sure.

To clarify that, I am sure there are a great many people in his age range with blood pressure ranges of his

age that have resulted in no diseases in their cardiovascular system by reason of that elevated blood pressure.

Q. Would you say that he is capable

[33]

of leading the State Police into a prison to quell a riot with that blood pressure?

A. I would say that he is.

Q. Could you quantify his suffering from coronary disease as a result of it?

A. Our observations in Framingham indicate that the systolic pressure -- the upper figure -- is just as important a factor as the diastolic pressure, particularly if one is talking about developing a cerebral hemorrhage, where if the blood pressure rises you might blow out a vessel. In this case this pressure is very slightly above what one accepts as a perfectly normal pressure and would be almost average for a man of his age.

The diastolic pressure is a little higher than what one likes to see.

Q. But it is fair to say that the blood pressure that he has significantly increases his chance for suffering from a coronary disease?

A. One has to be careful in using

"significantly" when one is talking in statistical terms. I would say that it does increase his risk to a heart attack, yes.

There is no point, however, where this risk suddenly changes. It is

[34]

on a continuing curve and one can say that somebody who has a blood pressure of 120/80 is a greater risk than one who has 100/60, and, by the same token, people who have much higher than he has, are a greater risk than he is. It is on a continuing scale.

Q. Is it fair to say that this blood pressure coupled with his aging increases the rate of probability, whatever that probability is?

A. Let us say he has an average probability at age 51, yes, this would increase his risk, bearing in mind that this is one casual measurement.

In order to really evaluate that, one would need further investigation.

Q. When you say that Colonel Murgia denied symptoms, did you then conduct a test to determine exactly what the symptoms were.

MR. LUCEY. Off the record.

(Discussion off the record.)

THE WITNESS. Well, the only way to determine symptoms is to ask the subject patient specifically about such factors as; do you have any shortness of breath, that you are aware of in usual activities, if you exert yourself is the shortness of breath any greater than one

[35]

experiences normally, and so forth.

Q. Did you make him do a few pushups so that he would become short of breath?

A. I did not subject him to any physical stress.

Q. It was solely on the basis of questions ans answers?

A. Solely on the basis of a history as obtained by asking questions as to what manifestations he might have.

Q. Does Colonel Murgia smoke?

A. I do not have that -- he did not smoke in my presence. I do not have a note as to whether he does or does not smoke. That is one thing that I would like to know in evaluating his risk, as to how much of a smoker he was.

Q. That would be a significant factor?

A. Yes, it is a significant factor;

specifically cigarette smoking is a factor, pipe and cigar smoking is of no real importance in determining risk of disease.

Q. Could I ask why you did not ask that question?

A. Well, smoking, of course, is something which the individual can do or not as he chooses, and there is no -- I have no control over that.

[36]

One could tell an individual that he is a greater risk if he smokes, and that is true of anybody at any age, and he could elect to do that. Let us say one could not retire him on the basis that he smoked, I would say that his rights were being discriminated against.

Q. Doctor, when you analogize the retirement ages in the military, do you think it is relevant that the military organizations are much greater in size than, say, the Uniformed Branch of the State Police?

A. No, I don't think that is a pertinent factor.

My assumption was that in the military it was desireable that the higher ranking officers be retained in the

service beyond the ages that some of the lower ranking individuals retired, because they wished to have individuals who had experience and judgment which could be called upon to the carrying out of military activities. That was the reason that they did not call for a mandatory early retirement age in the military.

Q. What would the retirement age for the lower ranking members be?

A. Well, they can retire after 20 years and can be retired after 30 years, that is the standard. They can

[37]

elect to take a 20 year retirement or to be forcibly retired after 30 years. That is the usual procedure in most of the services of which I am aware.

Q. What would the average of enlistment be?

A. Eighteen or twenty.

Q. It is fair to conclude that most of the lower ranking members of the military must retire around the age of 50?

A. Yes.

There were some individuals who came at later ages; so, you may find Sergeants who were in the 50's or even

60's. You don't find many, because -- I would think that might be true as well in an organization such as the State Police, that those who were of value to the State Police because they had achieved a higher rank, they were people with responsibilities, whose judgment was to be called upon and I would think it is probably no more reasonable to apply the principles that apply to all enlisted individuals to them as it is in the military.

Q. You do agree that it is fair to retire the lower ranking members at an earlier age than the higher ranking members?

A. The question of fairness ---

[38]

Q. Medically sound? Substitute the words "medically sound" for the word "fair."

A. I would not be happy in using "medically sound." I would think in terms of the efficiency of the organization that one does wish to have. One does not have a military that is made up of all old men, you wish to have them made up largely of younger individuals in the enlisted ranks, because they are admittedly people with more vigor, they are willing to take more

chances than the older individuals rather than, say, an ability to carry out a specific task.

I might clarify that by saying, that during World War II, for example, we took enlisted men in the Coast Guard up to and including age 55, which meant that if those individuals remained in the service, some of them would have been 60 or above by the time they finished World War II. Obviously in recruiting people to carry on an activity of this kind, one is more desirous of getting young individuals than in getting men in the 50's for no other reason than the fact that if a man at age 55 is only qualified to carry out the duties of an apprentice seaman, he is not the best kind of guy that you would want in the military.

Q. Doctor, you say that no electrocardiogram examination was performed?

A. That is right.

Q. Do you think it is fair to make a conclusive determination as to the health

[39]

of the coronary system without it?

A. No.

Even with a resting cardiogram

one cannot do that. I would want to do a number of tests on Colonel Murgia to determine specifically the capabilities of this individual or lack of evidence of existing disease, let us say.

Q. It is fair to say that your conclusion is a rather tentative one?

A. It is tentative based on a brief examination, yes.

Q. You have testified that he is capable of leading a charge at a prison riot; is that right?

A. Insofar as what I now know about him, yes. One has to remember that any kind of examination could always be more detailed, and that a more detailed examination on anyone might disclose something which you don't know. It is always a question of what is meant by a complete examination. It is never complete. There is always something more that you could do which, if done, might disclose that the individual had some dis-

[40]

order which did not come to light. To a great extent one is influenced by symptomatology; that is, how does a person behave under conditions of stress. All I

can do is by asking questions of an individual make an assessment as to what his capabilities are.

Q. Perhaps you have already answered the question, Doctor, but why would you make a determination that Colonel Murgis is capable of leading a charge in a prison riot on what you have already described as a tentative medical opinion?

A. Simply that I say, on the basis of what I know about him, the answer would be yes.

I dind't indicate that that alone would be conclusive, but from what I was able to learn from him, chiefly by history, and in the practice of medicine the history which the patient gives you largely determines your diagnosis -- this is an important function -- one assumes that the patient is telling you the truth. If the patient is telling you the truth, a great deal of his capabilities of functioning in the world is obtained simply by talking to him.

Q. Do you find that patients are always as open about their medical history as they should be?

[41]

A. Obviously people conceal certain bits of information about them and, of course, that is always true when one is examining people for insurance or for a job and so on.

By andlarge, however, my observations are that one should take seriously what the patient says. It is an unusual circumstance in which he deliberately does not tell you the fact.

Q. He might color his answers?

A. Yes. He might color it, yes. No one likes to admit to himself that he has anything wrong with him; so, he is inclined to be maybe optimistic when he answers questions.

MR. O'MALLEY. That is all I have.

REDIRECT EXAMINATION

Q. (By Mr. Lucey) Doctor, my understanding, and let us use this for a hypothesis, is that formerly the Uniformed Branch of the State Police for the Commonwealth of Massachusetts operated on a barracks system, and it is further my understanding that they currently operate on a four days on two days off system.

If that assumption is correct, do you have any medical opinion as to whether

[42]

the barracks system would be more stressful or less stressful than the four days on two days off system in terms of physical stress?

A. I find it difficult to believe that there would be any particular difference in this.

Q. Then it would be your opinion that living in a barracks setting with certain periods of separation from family and the amenities of home life would be less stressful on a member of the Uniformed Branch of the State Police than the current system of four days on and two days off with no confinement to barracks at all?

A. Again, I think this might be an individual matter. Someone who is having marital difficulties might have much less stress in the barracks than he would have at home. Some individual who dislikes being away from his home, might be more stressed psychologically by being in the barracks.

I think these would be minor factors.

MR. LUCEY. Thank you, Doctor, I have no more questions.

RECROSS EXAMINATION

Q. (By Mr. O'Malley) Would you say Colonel Murgia is an exceptional example of a healthy 51 year old?

[43]

A. Well, I think if one were to examine 51 year old men in a cross-section of a population, one would find not too many 51 year old men who looked as young as he does and are as vigorous, at least as reported to me, in his activities as he is without any difficulty. This may be a function of having been in the State Police rather than the other way around.

Q. Could you form an opinion as to whether he would be an exceptional 51 year old State Police Officer?

A. I wouldn't believe that my capabilities in passing on State Police Officers would allow me to say that.

MR. O'MALLEY. That is all.

REDIRECT EXAMINATION

Q (By Mr. Lucey) Doctor, you have stated on direct examination that it was your opinion that Colonel Murgia was in good health. If you had to quantify this on a percentile basis, would you have any

basis for so quantifying it and could you do so if you do have a basis?

A. I think I would have to have more information to quantitate this; that is, I would say more detailed electrocardiographic studies to be able to put it on a more quantitative scale.

MR. LUCEY. Thank you.

MR. O'MALLEY. Nothing further.

(Whereupon, the deposition was concluded at 3:29 o'clock p.m.)

[JURAT OMITTED IN PRINTING.]

[EXHIBIT OMITTED IN PRINTING.]

[TITLE OMITTED IN PRINTING.]

DEPOSITION OF DR. THOMAS F. SILVA, JR., taken on behalf of the Plaintiff, pursuant to Notice of Taking Deposition, before Carl H. Daitch, Certified Shorthand Reporter and Notary Public in and for the comoonwealth of Massachusetts, at the offices of Moulton, Looney, Mazzone, Falk & Markham, Esqs., 15 Broad Street, Boston, Massachusetts, on Monday, February 11, 1974, commencing at 10:10 o'clock a.m.

PRESENT:

Moulton, Looney, Mazzone, Falk & Markham, (by: Gerald F. Lucey, Esq., of counsel,) 15 Broad Street, Boston, Massachusetts, for the plaintiff.

Robert H. Quinn, Attorney General, (by: Terence P. O'Malley, Assistant Attorney General,) 373 State House, Boston, Massachusetts, for the Defendant.

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1	Copy of Complaint from the United States District Court, together with Exhibits A and B attached thereto	7
2	Three-page document being copy of Rule 5.14 "Trooper"	8
3	Thirteen-page document being Rule 10 "General Rules"	8

STIPULATIONS

It is stipulated and agreed by and between counsel for the respective parties that the reading and signing of the deposition by the witness and the certification, sealing and filing thereof is hereby waived.

All objections, except as to form of questions, are reserved for the time of trial.

DR. THOMAS F. SILVA, JR., having been duly sworn, testified as follows in answer to direct interrogatories by Mr. Lucey:

Q. Doctor, would you state your name and residential address for the record, please?

A. Thomas F. Silva, S-i-l-v-a,

Jr., 47 Shaw, S-h-a-w, Road, Brookline, Massachusetts.

Q. Your occupation?

A. Surgeon.

Q. Are you engaged in the private practice of medicine?

A. Yes, I am.

Q. In addition to your private practice, does your practice of medicine have other facets as well?

A. Yes.

Q. Will you please state those for the record?

A. My private practice is of general surgery.

[4]

For six years I have been team physician for the Boston Celtics Professional Basketball Team. For five years prior to that I was the team physician for Boston University Football and Hockey Teams.

Q. Are there any other facets of your practice that you would like to state for the record, or has what you said adequately described it?

A. I would think that that is adequate.

Q. Doctor, would you be kind enough

to state your educational background, starting with undergraduate work?

A. Tufts College, Bachelor of Science, 1948.

Tufts Dental School, Doctor of Dental Medicine Degree 1948.

Boston University School of Medicine, Doctor of Medicine Degree 1952.

Surgical residency at the University Hospital in Boston from 1952 to 1959.

Certified by the American Board of Surgery in 1960.

A Fellow of the American College of Surgeons 1962.

On the teaching faculty of the Boston University School of Medicine.

[5]

Q. What subject do you teach at the Boston University School of Medicine?

A. Surgery.

Q. Doctor, are you here this morning testifying pursuant to a subpoena that was issued from the Clerk's office on behalf of Robert D. Murgia?

A. Yes, I am.

Q. You are aware that this office represents Colonel Murgia?

A. Yes, I am.

Q. Before coming here today, Doctor, did you have occasion to make a physical examination of Colonel Murgia?

A. Yes, I did.

Q. Could you describe in detail that examination?

A. Colonel Robert Murgia came to my private office on February 5, 1974, for the purposes of being examined as to his state of health. He was found to be a fifty-one year old white male, five feet eleven inches tall, weight 190 pounds.

There was no history of having had any operations, of taking any major medications or of any hospitalizations.

Aside from reading glasses that he seldom used, his system review

[6]

was essentially negative.

The physical exam revealed that his head, eyes, ears, nose and throat were within normal limits.

There were no masses in the neck or in the thyroid gland, his lungs were clear and there was equal respirations on either side.

His heart had a normal sinus

rhythm.

A pulse of 76, a blood pressure in both arms of 138/84.

There were no abdominal masses.

There were no enlargements of any abdominal organs. There was no evidence of any inguinal hernia.

Rectal exam revealed no masses.

The extremities revealed no edema, normal pulses.

It was my impression that this was a healthy male of age 51, who I would approve for unlimited activity, physical and mental.

Q. What was the date of that physical exam, again, Doctor?

A. 2/5/74.

[REMAINDER OMITTED IN PRINTING.]

[JURAT OMITTED IN PRINTING.]

[TITLE OMITTED IN PRINTING.]

DEPOSITION of COLONEL PAUL JOHN MURPHY, a witness called for examination by Counsel for the Plaintiff, pursuant to the Federal Rules of Civil Procedure, before Richard L. Bendixen, Certified Shorthand Reporter and Notary Public in and for the Commonwealth of Massachusetts, at the Commonwealth Armory, 925 Commonwealth Avenue, Boston, Massachusetts, on Tuesday, February 26, 1974, commencing at 10:30 o'clock a.m.

APPEARANCES:

Moulton, Looney, Mazzone, Falk & Markham, (By: Gerald F. Lucey, Esq., and Robert D. City, Esq., of Counsel), 15 Broad Street, Boston, Massachusetts, For the Plaintiff.

Robert H. Quinn, Attorney, (By: Terence P. O'Malley, Assistant Attorney General), 373 State Street, Boston, Massachusetts, For the Defendant.

ALSO PRESENT:

Robert L. Wise, Esq.
79 Milk Street,
Boston, Massachusetts.

Corporal Thomas L. Byrne.

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A-1	Copy of a letter dated January 6, 1971 from Francis T. Burke, Major, Bureau of Administrative Services, to Colonel Paul Murphy, M.D., State Surgeon	16
A-2	Copy of a memo dated December 29, 1970, Subject: Medical Standards for State Police Recruit Applicants.	16
A-3	Multi-page document entitled "Medical Fitness Standards for Initial Appointment to the Massachusetts State Police".	16
B	Document entitled "Check List of Medical Standards for Examination of Candidates for Trooper".	17
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D	Letter dated January 2, 1974 addressed to Mr. Terence O'Malley, Assistant Attorney General, from Sergeant Raymond H. Graves, State Police Executive Office.	43
E	Letter dated January 2, 1947 and described as containing a list of State Police officers retired for disability from 1967 through and including December, 1973	44
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[ALL OF THE PRECEDING NUMBERS REFER TO PLACEMENT AND PAGINATION IN THE ORIGINAL DEPOSITION.]

[3]

STIPULATIONS

It is stipulated and agreed by and between counsel for the respective parties that the reading and signing of the deposition by the witness and the certification sealing and filing thereof is hereby waived.

All objections, except as to form of questions, are reserved for the time of trial.

COLONEL PAUL JOHN MURPHY, a witness called for examination by Counsel for the Plaintiff, having been duly sworn, testified as follows in answer to direct interrogatories by Mr. Lucey:

Q. Colonel Murphy, will you state your name and address for the record, please?

A. Paul John Murphy, 2 Hawthorne Place, Boston, Massachusetts.

Q. How old are you?

A. Thirty-nine.

Q. And would you please state your educational background commencing with undergraduate and through and including medical school?

A. Harvard College, Harvard

Medical School and then a five-year surgical training resident program at Boston City Hospital.

[4]

Q. And what year did you graduate from Harvard College?

A. 1955.

Q. And what year did you graduate from Harvard Medical School?

A. 1960.

Q. And when did you complete your residency?

A. 1965.

Q. And, again, that was at what hospital?

A. Boston City Hospital.

Q. Was that -- Do you have any other internships orresidencies?

A. No, that would be one single program.

Q. Are you certified by any medical or professional boards?

A. I did not take my boards, no, in surgery.

Q. And do you specialize in any area of medicine?

A. I'm basically an administrator.

Q. And are you a member or fellow of

any professional associations?

A. Military Surgeons of the United states in one. There may be some others, but I don't recall them off-hand.

Q. Okay.

And you aren't currently teaching at any medical schools or anything of that nature?

A. No, I'm a former instructor in surgery at Tufts University Medical School, but I'm not currently an instructor.

Q. And over what period of time were you an instructor at Tufts?

A. That would have been 1959 through 1960, '61, approximately in that area.

Q. And in what area did you give instruction?

A. Surgery.

Q. Surgery?

A. Right.

Q. Having in mind, Colonel, that you graduated from medical school in 1960 and completed your residency in 1965, would you state what you have been doing professionally since 1965?

A. Well, basically what I've been doing has been reviewing medical fitness

standards for, I'd say, all military personnel; for the past four years, the State Police.

Q. Well, stated another way, what did you first do after completing a residency at Boston City Hospital? Did you then get a job somewhere?

[6]

A. No, I have always been self-employed.

Q. Self-employed?

A. Right.

Q. And what was that employment?

A. Well, I should change that a little bit. I have been, basically, acting as a State Surgeon. I was appointed as a State Surgeon in 1969, but I have been acting as a State Surgeon since 1964.

Q. Okay, and as State Surgeon, is your title Surgeon General of the Commonwealth of Massachusetts?

A. It depends upon which chapter of the law you read. Under Chapter 32 it's State Surgeon General; under Chapter 33 it's State Surgeon.

Q. Okay.

And you were appointed State Surgeon in 1965 and you have been

serving --

A. No, 1969.

Q. 1969; and you have been serving in that capacity in the interim?

A. That's correct.

Q. And in addition to being State Surgeon, do you have any other professional duties?

A. Yes, I', also State Police Surgeon, which is a separate title. I am the Medical Consultant to the Commission of Veterans Services for the Commonwealth of Massachusetts.

[7]

Q. And when did you become State Police Surgeon?

A. 1970.

Q. And was this be appointment or --

A. I don't understand the question.

Q. Well, are you appointed State Police Surgeon or is it like a job that you apply for?

A. That is a job that comes out of the 03 Account.

Q. It would not be a Civil Service job?

A. No.

Q. And, Colonel Murphy, are you here

testifying today pursuant to a subpoena issued from the Clerk's Office of the United States District Court for the District of Massachusetts?

A. That is correct.

Q. And are you aware of the fact that I'm associated with a law firm that presently represents Colonel Murgia in litigation pending before that court?

A. That is correct.

Q. And are you presently aware that the law suit brought by Colonel Murgia involves his involuntary retirement on July 23, 1972, from his position as Colonel and Head of the Union Branch of the Massachusetts State Police?

[8]

A. No, I do not agree with that statement.

Q. Well, could you please tell me what your understanding is of Colonel Murgia?

A. You said his "involuntary" retirement; I would prefer to use the word "mandatory" retirement.

Q. Thank you.

What is the rule, Colonel Murphy, with respect to mandatory retirement of

State Police officers, or what is your understanding?

A. My understanding of the State Police retirement is that they are eligible for retirement after 20 years of service or attaining maximum age, which is 50. There may be an exception with someone with broken service who would then go beyond age 50 to get his 20 years to be eligible for some sort of annuity.

Q. And in Colonel Murgia's case, under which decision did he retire?

A. My understanding is that he went to the maximum age, which is 50.

Q. Now, Colonel Murphy, would you please state for the record your duties as Surgeon General of the Commonwealth of Massachusetts as they relate to the State Police only?

A. Well, as Surgeon General, the only way they relate to the State Police would be as president of the State Police Disability Retirement Board.

[9]

Q. And what is required of you in the execution of this duty?

A. Anyone who applies for a disability retirement is referred to the

Retirement Board, which consists of myself, the Commissioner of Public Health and the Commissioner of Public Safety, or his designated representative. We, in turn, will examine the application for disability retirement and make a determination whether or not we recommend the individual be retired on a disability basis.

Q. And how does retirement on a disability basis differ from mandatory retirement on a non-disability basis?

A. Disability retirement, they have 72 percent of their salary as opposed to the average retirement which would be 50 percent after 20 years, one percent for each year they serve after that.

There is also a restriction on disability retirement in that they cannot earn more than $1,000 more per year than they were earning at the time they were fully employed.

Q. Now, Colonel, would be kind enough to state for the record your duties as State Police Surgeon?

[10]

A. Right, my primary duty as State Police Surgeon would include, A, determining whether or not an individual

meets the requirements for reinlistment, in other words, for full duty; and, secondly, when someone is injured or is ill, determining whether they should be returned to a full duty or a so-called light duty status.

Q. Would you please describe what is meant by a full duty status?

A. Full duty status means that he is able to perform all duties required of a State Police officer.

Q. And would you please describe what is meant by a light duty status?

A. That primarily involves desk duty.

Q. Now, do you have any additional duties as State Police Surgeon?

A. Yes, I also sit as a member of the Board of Claims.

Q. And are there any duties that you have omitted to mention that is --

A. As far as the State Police go?

Q. Yes, sir.

A. That would be the extent of my association with the State Police.

Q. And this is the extent then of your association with the State Police --

A. -- State Police Surgeon.

[11]

Q. Okay.

Would it be fair to say that you have no connection with the State Police in a medical capacity other than primarily as State Police Surgeon and, secondarily, as --

A. And Disability Retirement Board.

Q. And the latter is secondary type of capacity as Surgeon General of the Commonwealth?

A. Right.

Q. Now, Colonel Murphy, are your duties as State Police Surgeon set forth in any statute or any set of rules and regulations that you can refer me to?

A. Yes, you have the rules and regulations of the State Police.

Q. And would your duties be set forth in a particular segment of those rules and regulations, or would they be scattered throughout?

A. There is one section I'm aware of where they mention it briefly. Whether they are scatterd throughout, I don't know, because I have not memorized all of the rules and regulations.

Q. I can't understand that.

Would one of your duties, Colonel, be set forth in Rule 7.4 of the rules applicable to Massachusetts State Police?

[12]

A. Without seeing the rules and regulations, I can't answer the question.

Q. Maybe I could elaborate further.

That rule deals with the physical examination for applicants to the State Police who have passed the medical exam.

A. That's correct. I know the one you are referring to now, all right, that is correct.

Q. And do you have some duty in connection with applicants to the State Police force?

A. Yes, we do.

Q. And what would that duty be?

A. Examine all of the applicants who pass an agility test and written examination, and we determine whether or not they meet the medical fitness standards which were approved by the Commissioner of Public Safety.

Q. Now, Colonel Murphy, do you as State Police Surgeon prescribe the medical fitness standards that all applicants to the State Police force must meet?

A. I submitted them to the Commissioner of Public Safety. He, in turn, approved them.

Q. He approves them?

[13]

A. Correct.

Q. And would you have a copy of these medical fitness standards?

A. I believe Corporal Byrne has a copy down there.

I'll make sure it's complete.

We are missing one piece of paper.

MR. BYRNE: The letter?

MR. O'MALLEY: We'll go off the record here while we are straightening out the records.

(Discussion off the record)

A. All right, this is a copy of the standards that we used.

MR. O'MALLEY: Back on the record.

Q. Let me have a few moments to look at these, please.

MR. O'MALLEY: Off the record.

(Discussion off the record)

MR. LUCEY: I will correct it with a new statement.

Q. Now, Colonel Murphy, in connection with the question I asked a few moments ago concerning physical examinations for applicants to the State Police force and in which I made reference to a Rule 7.4, I show you a document which purports to set forth Rule 7.4 and ask you if that is an accurate statement of the rule.

[14]

A. That's correct, but this is basically a restatement of what I said, which is, "The examination shall be to the extent prescribed by the State Police Surgeon and approved by the Commissioner." That would mean the Commissioner of Public Safety.

Q. Just to clarify the record, Colonel, would you be kind enough to read Rule 7.4 into the record?

A. (Reading) If the applicant passes a mental examination, he is then required to pass a physical examination. This physical examination shall be in such manner and to such extent as may be prescribed by the State Police Surgeon and approved by the Commissioner. If the applicant fails to meet the requirements of such physcial examination, he

will not be considered eligible for enlistment. The Commissioner may, however, in his discretion waive any physical or mental disqualification. (end reading)

Q. Thank you.

Now, a few seconds ago, Colonel, you handed me 23 pages of materials which purport to be the medical fitness standards applicable to applicants to the State Police force. Now, in looking through them I've noticed that there are some line-outs and some insertions. Would you be kind enough to explain --

[15]

A. Certainly.

Q. -- how a line-out might have occurred or insertion?

A. Shortly after I became State Police Surgeon there was a new group of applicants. At that time there was only a single page of medical requirements, which I felt were inadequate, and I had recommended to the Commissioner that we establish not necessarily more rigid but more definitive medical qualifications, and the basic qualifications that are in that document that you have there are the same as those for an individual who is

to undergo basic training at a military installation. So most of those pages are taken directly out of an Army regulation, and that is why there are no line-outs. Time is short, so we didn't retype the whole thing, we just reproduced them.

Q. Fine, and this was adapted then for State Police purposes from the military?

A. Correct.

Q. So what we have here is, in substance, the accurate statement of the physical standards?

A. Those are the current physical standards.

Q. Okay.

MR. LUCEY: May those items be marked?

(Copy of a letter dated January 6, 1971 from Francis T. Burke, Major, Bureau of Administrative Services, to Colonel Paul Murphy, M.D., State Surgeon, was marked Exhibit A-1).

[16]

(Copy of memorandum dated December 29, 1970, Subject: Medical Standards for State Police Recruit Applicants, was marked Exhibit A-2.)

(Multi-page document entitled "Medical Fitness Standards for Initial Appointment to the Massachusetts State Police" was marked Exhibit A-3.)

Q. Now, Colonel, in 1969 you became State Police Surgeon?

A. No, State Surgeon '69, State Police Surgeon 1970.

Q. State Police Surgeon in 1970?

A. That's correct.

Q. And you have testified that at the time you became State Police Surgeon the medical fitness standards were not as complete and as definitive as you would like to see them?

A. That is correct.

Q. Do you have in your possession a copy of the Medical Fitness Standards that obtained prior to 1970?

A. I believe I do; and, if you will excuse me a minute, I think I can get them.

Q. Okay, or we can just --

A. It will only take a minute.

[17]

Q. Okay.

(Deponent left room and returned)

Q. Now, Colonel, you have handed me

a document entitled "Check List of Medical Standards for Examination of Candidates for Trooper". Does this document reflect the medical fitness standards that obtained prior to 1970?

A. It is my understanding that that is the standards that they had.

MR. LUCEY: May this be marked?

(A document entitled "Check List of Medical Standards for Examination of Candidates for Trooper" was marked Exhibit B.)

Q. Now, Colonel, where is the physical examination for applicants to the State Police force given?

A. They're given right here, 925 Commonwealth Avenue.

Q. And by whom are these physical examinations conducted?

A. They were conducted by approximately 30 medical officers who are members of my staff in the 114th Medical Battalion.

Q. And these would be reserve medical officers in the National Guard?

A. These would be medical officers in the National Guard, that is correct.

[18]

Q. And these physical examinations

would be conducted under your supervision?

A. That is correct. The basic procedure is that they would go -- We did approximately 1,000 examinations just a short time ago. The individuals were examined and then everyone that was examined, his examination was then reviewed by me to be sure it met the standards that we had established under the approval of the Commissioner.

Q. Now, Colonel, would you be kind enough to describe for me what this initial examination for applicants to the State Police force consists of? Now be as specific as you can.

A. Well, if I may refer to --

Q. Please do.

A. All right, to do the portions of it which are not relevant to the --

Q. If I could interrupt, please, state for the record what document you are referring to.

A. I'm referring to the reports of medical examination.

Q. And does that have a form number designation?

A. The one that was utilized for candidates was a state for, but it was

adapted from Standard Form 88, which is a federal form, and there is also a Standard Form 93, federal for. The 93 consists of a medical history, The individual must first complete the 93; then the items on the report of medical examination that are required, working rather backwards in getting the part that are done by technicians first, we have a urine examination, a blood serology, chest x-ray, audiometric examination, color vision, near vision, distant vision, blood pressure, pulse, height, weight, color hair, color eyes, body build, and then the examining physician is required to examine for any defects.

Do you wish me to list all of the things examined?

Q. Please do.

A. All right, head, face, neck and scalp, nose, sinuses, mouth and throat, ears, eardrums, eyes, ophthalmoscopic, pupils, ocular motility, lungs and chest, heart, vascular system, abdomen, viscera, anus and rectum, endocrine system, G-U System, upper extremeties, feet, lower extremeties, spine, identifying body marks, skin-lymphatics, neurolocic and

psychiatric.

Q. Now, Colonel, what would an examination -- Strike that.

What type of an examination would be conducted with respect to lungs?

[20]

A. You would have two examinations of the lung. One would be percussion auscultation; the other would be chest x-ray.

Q. And what type of an examination would be conducted with respect to the heart?

A. Auscultation.

Q. And could you elaborate on that for a layman, please?

A. This is primarily where you listen to the heart, you are looking for any murmurs or any irregularities in rhythm, this type of thing.

Q. And what type of an examination would be conducted of the cardiovascular system?

A. Your opthalmoscopic is probably your most important in this respect: in that you then can look at what the arteries and veins look like, but you also would get some idea just by an examination

of the extremeties, pulses, this type of thing, skin temperatures.

Q. All right.

No electrocardiograms?

A. Electrocardiograms -- Now we are talking applicants?

Q. Yes.

A. An applicant is under 40; therefore, there would be no electrocardiogram, unless indicated.

As a matter of fact, let me clarify that a little bit, there were some applicants that we did do electrocardiograms on because there was a question of irregularity of their heartbeat or something like this, so an EKG was done.

Q. And this irregularity was done by listening to the heart in the preliminary stage --

A. Right.

Q. -- examination?

A. Right.

Q. What kind of things are revealed by an electrocardiogram examination?

A. An electrocardiogram will basically show you an abnormality if it exists at the time you do the electro-

cardiogram. It will not predict the future. It may show you a past history of a cardiac disease, it normally will show you a current history. It will not show you a future history and will show you what we call arhythmias or irregular beats.

Q. Now, Colonel, would you please tell me what types of diseases, defects or physical conditions will cause an applicant to fail the initial physical fitness examination?

A. Well, I would have to go through all of the 20 some-odd pages of that document that you have there.

[22]

Q. Well, could you give us the more common types of --

A. The most common ones that we ran into several months ago were vision, height, and color-blindness.

Q. Now, if an individual passes this initial physical examination, are these records kept somewhere in his files?

A. They are turned over to the Personnel Office at the State Police.

Q. And they became a permanent part of the individual personnel or medical

history?

A. That is my understanding.

Q. Now, Colonel, Rule 7.4 provides that if an applicant fails to meet the requirements of the initial physical examination that he will not be eligible for enlistment, but the rule further provides that the Commissioner may in his discretion waive any physical or mental disqualification.

What procedure must an applicant follow to secure a waiver of a physical defect?

A. In the four years that I have been a State Police Surgeon, no waiver has been granted for an applicant.

Q. Do you have any feel for or idea of the situation with respect to waivers of initial physical examination defects prior to your becoming State Police Surgeon in 1970? Would you --

[23]

A. Having no experience with it, I really couldn't comment on it.

Q. Have any applicants who have failed the initial physical exam filed for waivers since you have been State Police Surgeon?

A. Yes.

Q. And what types of defects would these individuals have or might they have?

A. Again, coming back to the most common ones, height, vision and color-blindness.

Q. But, again, these have not been waived since you have been State Police Surgeon?

A. No.

Q. And would you be consulted by the Commissioner if a waiver were to be granted to an applicant?

A. In many cases he would ask me to do a re-examination, which we would certainly do.

Q. But no written standards obtain to --

A. The same standards which still apply.

Q. Now, Colonel, are you aware of the mental examination that is given to applicants to the State Police force?

A. You mean have I ever seen it?

Q. Well, are you aware of what it consists of?

[24]

A. No, I am not.

Q. So you wouldn't be able to

describe that for me today in any sort of detail?

A. No.

Q. Now, Colonel, are you generally familiar with the duties of the members of the Massachusetts State Police?

A. I would say that I could answer that very strongly "yes".

Q. Permit me to show you a document entitled "A Career With the Massachusetts State Police". More appropriately, I should describe it as a promotional flier aimed at informing applicants who might be interested in applying to the State Police of what the duties and the requirements of the job are.

Let me call your attention to the paragraph entitled "Troopers' Basic Duties" and ask you to read it and tell me if that adequately and fully describes the duties of a State Police Trooper.

A. Yes, I would modify it in only one respect by saying that that is the general outline of duties of all State Police officers.

Q. Let me see if I am correct in my understanding.

This paragraph describes not only

the basic duties of a State Trooper but the basic duty of any member of the Uniformed Branch of the Massachusetts State Police?

[25]

A. Correct.

MR. LUCEY: I would like to introduce this and have it marked.

(A document described as a promotional flier entitled "A Career With the Massachusetts State Police" was marked Exhibit C.)

Q. Now, Colonel, having in mind that you testified that this paragraph in Exhibit C entitled "A Trooper's Basic Duties" adequately describes the duties of a State Policeman, do you have a medical opinion as to the types of physical stress factors that are involved in the performance of these basic duties?

MR. O'MALLEY: I am objecting to the form of that question.

MR. LUCEY: Okay, could you read it back, please?

(The pending question was read back by the Reported.)

MR. O'MALLEY: Off the record.

(Discussion off the record)

MR. LUCEY: Let's strike the question; I'll give it again.

[26]

Q. Colonel, on the basis of your general knowledge of and familiarity with the duties of members of the Uniformed Branch of the Massachusetts State Police, do you have a medical opinion as to the types or the nature of physical stress factors involved in the performance of these duties?

A. Well, again, I have to come back to and say the forms of these duties. Which duties are you referring to?

Q. The whole gamut of duties that a State Trooper must be constantly ready to perform, ranging from --

A. All right, now are you asking me do I have a medical opinion? A medical opinion in what respect?

Q. In other words, are the types of duties that a State Trooper must necessarily be ready to perform at any given moment on duty, and, I suppose, even off the duty; are these types of duties very demanding and to they tax the body in specific ways, or are they really no more stressful than the duties, let's say, of

a milk delivery man?

A. I would say the duties are definitely more stressful than those of a milk delivery man; and because of the nature of the State Police, they are more stressful than you local Police Department.

[27]

Q. Okay.

Now, could you please tell me in what ways are the duties of a State Policeman physically stressful?

A. All right, number one, a State Policeman generally works alone. This is as opposed to most of your municipal Police Departments where they work together. It is a small force covering the entire state as opposed to -- if you take the Boston Police Department of approximately 2,100 or 2,300 covering a smaller area. Therefore, you have already the mental stress of knowing that you do not have immediate backup.

The State Police is, as you note in the exhibit that you entered into evidence, the backup force. He is the one that is called on in riots, or he is the one that is called on when you have a problem as you did at Walpole or Norfolk.

These are both physically and mentally stressful. It is a State Police officer who is the one that is apt to be out on Route 495 with an accident at 2:00 o'clock in the morning and there is no one around. There is both physical exertion involved here and mental stress. These are the types of things that I am looking at.

Q. Proceeding from the mental stress aspects of the job and concentrating on the physical exertion that you have referred to, do you have any medical basis or have you made any observation which would bear out the hypotheses that the physical stresses on a State Policeman cause physical deterioration at a more rapid rate or of certain aspects of the body more so than would be the case if an individual were not a State Policeman?

A. Yes, I do.

We have approximately 200 State Troopers between the ages of 40 and 50. In that age group there are 23 with hypertension, which is a figure that is rounded off to 10 per cent. This is twice what you would expect in the normal population. When you consider this is a pre-selected group and that none of them

should have had hypertension when they came on the job, I think it's fair to presume that there is definite stress on the cardiovascular system.

Q. Would it be fair to say that no individual with hypertension is passed in the initial physical examination?

A. In the period of time that I have been associated with the State Police that would be a definite statement. I cannot speak prior to that because I don't know.

[29]

Q. Now, do you have a medical opinion as to what particular aspects of a State Policeman's duties are stressful to the cardiovascular system? In other words --

A. My medical opinion on that would be it is probably more emotional than physical in terms of the effect on the cardiovascular system.

Q. So might it be fair to say then that an annual mental examination might be more relevant in terms of insuring that State Policemen do not develop cardiovascular problems than would be a physical exam?

A. If you go back to my testimony

on part of the examination, it includes mental status evaluation.

Q. But is the mental examination only a part of the initial exam for the applicants, or is it also a part of the annual physical exam?

A. It is part of their re-inlistment examination for those under 40. That is every two years. Age 40 on, it is annual.

Q. On the basis of your testimony, Colonel Murphy, would it be fair to say then that the stress factors that are most significant in the duties of a State Trooper are mental stress factors, even though these stress factors might manifest themselves in physical problems?

A. No, I think you have to look at two aspects here.

[30]

I was pointing out that there is a very strong mental stress factor, but there is also the requirement of physical strength.

Q. But is this requirement for physical strength any greater than the requirement of physical strength, to use the example that you used of a few moments

ago, of a member of the Boston Police Department?

A. Yes.

Q. And in what way is the requirement for strength greater on the part of the State Policeman than it would be on the part of a member of the Boston Police force?

A. Because he usually is working alone; he does not have assistance.

Q. Now, Colonel,you have mentioned in addition to the initial examination for applicants, a re-inlistment physical and, also, an annual physical for members of the State Police force after they have reached the age of 40. Would these then be the three types of physical exams?

A. Correct.

Q. And there would be no others that a State Policeman would take in the ordinary course?

A. He may have a physical on his own with his own physician.

[31]

Q. These would be the official physicals we are talking about?

A. Those would be the officials, correct.

Q. Would you please tell me what a re-inlistment physical consists of?

A. It consists exactly of what I gave earlier as the initial physical, with the exception of we do not repeat the entire history, we only take an interim medical history.

Q. And would the same be true then of the annual physical after 40?

A. No, the annual physical has in addition an electrocardiogram and tests for any gastrointestinal bleeding.

Q. And what is the test used to determine whether there is gastrointestinal bleeding?

A. You take a stool test and take a pill, a tablet, that we call hematest.

Q. Now, where is the re-inlistment physical given and by whom is it given, Colonel?

A. They are given by the same medical officers that I mentioned earlier.

Q. And the same would be true with respect to the individuals who have reached 40?

[32]

A. Correct.

Q. Now, what particular things to you

look for in the re-inlistment physical?

A. Basically what you are looking for is any physical defect of any type. Now, if you find a physical defect, then the question you have to ask is: "Does this impair his duties and functions as a State Police officer?"

Q. What particular things do you look for in the annual examination that is given to members over 40?

A. Again, basically the same thing, any defect; and I would like to emphasize here that history is just as important as the examination itself.

Q. Now, Colonel, do the same standards apply in the re-inlistment and the annual physicals in terms of what might disqualify a State Trooper from being certified as able to perform his duties?

A. No.

Q. How does the initial -- Or how do the re-inlistment and the annual physicals after 40 differ from the initial physical in terms of standards?

A. All right, two ways.

Number one is, as I mentioned, any medical defect. Then you must determine whether this particular defect is

[33]

going to affect his duties as a State Police officer. If it is felt that they would, then he would wind up on a waiver and/or a light duty status.

Q. Now, who makes the determination as to whether or not a particular individual meets the physical standards?

A. I do.

Q. And this would be based upon a review of the medical records that are presented to you by the examining physician?

A. I would take the medical records and then I would also interview the individual.

Q. And might you conduct a further physical examination?

A. I might, correct. Generally, what I do is refer him to his own physician if it is not related to the job.

Q. What types of defects would be pertinent in determining whether or not a trooper is physically fit to re-inlist or to meet the standards after age 40?

A. After age 40?

Q. Would there be two different --

A. There are two different types.

One, you might have a temporary condition, which I believe we do have a listing here, such as a hernia. Now, that is a repairable condition. But as long as he's got the hernia, he's not capable of performing the full duties of a State Trooper because we now get into the problem of the physical aspect of it; in other words, he shouldn't be doing heavy lifting.

[34]

Then we have -- We have another type which woulc be, again, coming back to the cardiovascular system, hypertension, where he shouldn't really be exposed to stressful situations.

Q. Could you please tell me what you mean by hypertension and how it manifests itself?

A. Yes.

Hypertension is not one elevated blood pressure reading, it is persistent elevation of the blood pressure.

It also manifests as it progresses by changes in the eyebrow, which is what you see in the ophthalmic system. The first thing we get is A.V. nicking, anuria venus nicking.

There may be electrocardiographic

changes indicating left ventricular hypertrophy.

It is also manifest clinically by such things as headaches, nose bleeds, a light-headed feeling, and I believe I can go on for several more pages if you wish.

[35]

Q. That's good enough.

Would it be fair to say then that the re-inlistment physical is designed to determine conditions which would interfere with the performance of duty by a police officer?

A. Correct.

Q. And is there then a determination made as to whether this condition is temporary or permanent?

A. Correct.

Q. And are there any written standards or rules and regulations which pertain to the making of this determination?

A. No.

Q. Is there a list or is there set forth in any written document a list of those standards or those conditions which are determined to be temporary or repairable and those conditions which are

determined to be permanent?

A. Any medical book will tell you that.

Q. Could you please state for the record some conditions which are encountered in the physical examination of State Troopers which you determined to be common to the job, yet temporary?

A. Well, I gave you the most common one, which is a hernia.

[36]

Q. And I believe you mentioned hypertension as well.

A. I consider hypertension to be one that is permanent, provided the diagnosis is correct.

Now as I started to say earlier, you don't make the diagnosis in one blood pressure reading and when we get an elevation blood pressure, the individual is then referred to his own physician, is hospitalized, has the appropriate tests and either the diagnosis is confirmed or not confirmed.

Q. Are there any conditions other than a hernia which are frequently encountered in the State Police population which you would term temporary?

A. Frequently encountered?

Q. Or common or sometimes encountered. Why don't you state the characterization which is most appropriate and state the condition.

A. Yes.

Q. In other words, I'm interested in determining what other conditions --

A. You could have a ruptured disc, which you see very commonly -- well, let's not say "very" commonly, you see it commonly; knee injuries, all of which can be repaired by surgery and when the individual recovered he then goes back on full duty. Those are two that come to mind immediately.

[37]

Q. And if in the case of a knee injury for which the prognosis was good or a ruptured disc for which the prognosis was good and the condition did not improve and, therefore, turned into a permanent disability impairing the trooper's ability to perform, would some mechanism be set in motion which would change the classification from a temporary disability to a permanent disability?

A. He would be retired.

Q. Now, in addition to hypertension, what other types of permanent disabilities might one expect to find in the general population of State Police officers?

A. Generally we'd be talking in the areas of injuries, and this could be anything because most of the injuries are the result of cruiser accidents, and it could be a frozen shoulder, which is one case I can think of off-hand, back injuries, knee injuries, any injuries to the joints, bad head injuries.

Q. And these, again, would result in the individual troopers being retired with disability --

A. If there is a permanent disability, he would be retired, that is correct.

Q. Now, Colonel, approximately how many members are there in the Uniformed Branch of the State Police Department at the present time?

[38]

A. Approximately 860.

Q. And do you know, and feel free to say no if you don't know, do you know whether the physical examination that is given to members of the Detective Branch

is the same as that given to the members of the Uniformed Branch?

A. I do not believe the members of the Detective Branch have any physical examination other than their initial one.

Q. So it is your belief then that there is no re-inlistment examination requirement or annual physical requirement --

A. That is my understanding.

Q. Now, Colonel, you have mentioned the term"waiver" or "medical waiver". What do you mean by that?

A. What a waiver is, basically is, is if on examination we find phusical defect, it is at the Commissioner's discretion to waiver him, and I do not get into the waiver beyond that point. All we do is make a report, and the Commissioner decides what he is going to do.

Q. Okay.

So my understanding then is that a trooper takes his re-inlistment or over-40 annual physical examination and then, if a defect is found, a report of this defect is made to the Commissioner, whether the defect be temporary or permanent.

[39]

A. Correct.

Q. And the Commissioner takes action upon that.

A. Correct.

Q. Is there a form used to convey to the Commissioner that a defect exists?

A. It is sent over on what we call a buck slip, the man's name, what the defect is, and we not whether it's temporary or permanent.

Q. So it's an informal type of communication.

A. Informal type of communication, correct.

Q. And do you know if there are any written standards or criteria by which the Commissioner makes his determination as to whether to waive a temporary or permanent defect?

A. Not to my knowledge.

Q. Have you, since your tenure as State Police Surgeon, been requested by the Commissioner to provide him with any advice or standards or criteria which he might implement in making his decision with respect to temporary or permanent disability waivers?

A. I have been requested in terms of being asked whether or not an individual whould not be requested to retire. As far as the temporary disability goes, that really should be no problem.

[40]

Q. So would it be fair to say then, in terms of temporary disabilities such as hernias, the Commissioner had discretion as to whether or not to permit the individual to serve under a waiver; is that true?

A. Correct.

Q. And would it be further fair to say that he generally does permit an individual with a temporary disability to serve?

A. Correct.

Q. Can you recall an instance when the Commissioner has not permitted an individual with a temporary disability to serve under a waiver?

A. Well, in that I don't know whether or not he grants all of the waivers, all I can give you now is hearsay, which is to my knowledge, he has not signed waivers -- it's either four or six people recently.

Q. And this would be the case --

A. But this is only hearsay.

Q. And this would be to your understanding in a case of a temporary disability?

A. No, these are permanent disabilities.

[41]

Q. To your knowledge, since your tenure as State Police Surgeon beginning in 1970, has the Commissioner permitted any individual with a temporary disability to serve?

A. Yes, he has.

Q. Can you tell me in approximately how many instances this has taken place?

A. I think if we take the --

Do we have that list? I think I can come up with a pretty accurate figure.

We would be talking in the neighborhood of 10 to 12 people.

Q. I'm sorry, I didn't get that.

A. Approximately lo to 12 people, from that list.

(SHORT RECESS)

MR. LUCEY: Would you read back the last question?

(Testimony read back)

MR. LUCEY: I think I'd better clarify that.

Q. Let me ask one more question. To your knowledge, since your tenure as State Police Surgeon commencing in 1970, has the Commissioner permitted any individual with a permanent disability to continue to serve?

A. All right, the 10 to 12 people that I am talking about are those that are currently serving. So the answer would be "yes".

[42]

Q. Okay, fine.

Now, can you tell me how many members presently serving with the Uniformed Branch of the State Police are serving under waivers of temporary or permanent physical defects?

A. That is the 10 to 12 figure we were talking about.

Q. And you have handed me a letter dated January 2, 1974, addressed to Mr. Terence O'Malley and containing a list of officers assigned to the Uniformed Branch of the Division of State Police who had waivers on disqualifying physical defects in connection with re-inlistment during

the calendar year 1973, and I show you that letter and ask you what that list represents.

A. Well, this would indicate individuals who during the year 1973 we found some type of defect, whether it be permanent or temporary. In several of the cases that are listed here it was a temporary defect and, in some cases, has already been corrected. In other cases it is permanent. I do not know whether or not all of the individuals listed on here have been waivered by the Commissioner.

MR. LUCEY: May this be marked?

[43]

(A letter dated January 2, 1974 addressed to Mr. Terence O'Malley, Assistant Attorney General, from Sergeant Raymond H. Graves, State Police Executive Office, was marked Exhibit D.)

MR. CITY: For the record, the parties stipulate and agree that the names of the individuals are deleted but that they are actually persons serving in the Division of the State Police. Should the court require, we would make

the names available to the Court.

MR. O'MALLEY: One qualification: on the word "presently" serving, some may have been retired.

THE WITNESS: I think we can say some have been retired.

Q. Now, looking at Exhibit D, Colonel Murphy, could you please tell me which physical defects on that list are considered temporary and which are considered permanent?

A. Yes, the ones that are considered temporary were the hernia, the one that is listed as GI bleeding, and one listed simply as injury. This is a trooper that was involved in a cruiser accident but is progressing.

Q. And would it be fair to say then that the others are considered by you to be permanent disabilities?

A. Correct.

[44]

Q. And they would be hypertension, diabetes, angina pectoris, one kidney and myocardia?

A. Myocardia infarction is what that stands for, that is correct.

Q. Thank you.

Now, I show you a second list dated January 2, 1974, contained in a letter to Mr. Terence O'Malley and ask you what that list represents.

A. This is a listing of State Police officers retired for disability from 1967 through and including December, 1973.

MR. CITY: I think the same stipulation will apply to that document.

MR. O'MALLEY: That's correct.

MR. LUCEY: May this be marked as Exhibit E?

(A letter dated January 2, 1974, and described as containing a listing of State Police officers retired for disability from 1967 through and including December 1973, was marked Exhibit E.)

Q. Now, Colonel, referring to Exhibit E, this list again contains information relative to individuals who are now retired from the State Police?

A. Correct.

Q. And do you have any personal knowledge as to whether these individuals were permitted to serve in the Uniformed Division of the State Police with either temporary or permanent disabilities prior

to their retirement?

[45]

A. Well, I would say that if we start with 1972, almost every individual there, to my memory, retired within a reasonable time of the discovery of their disability.

Q. By reason of --

A. Wait, I just want to finish looking at the list.

Q. Sure.

A. With the exception of possibly two.

Now prior to '72, all right, if we take the period 1970 to 1972, which I would again have personal knowledge of, again, they all retired within a reasonable period of time of finding their disability.

Q. Fine.

Now, these defects, Colonel Murphy, would they have been revealed during the annual physical which is required of members over age 40?

A. In every instance of cardiovascular disease, that is how they were discovered.

Q. And in stating that they retired within a reasonable time after the

discovery of the defect, would it be a matter of months or would it be in some cases over a year after the discovery of the defect?

[46]

A. It would be unusual to go over a year.

Q. Would it be unusual for it to be more than six months after the discovery of the defect, or would it be usual for it to be less than six months after the discovery?

A. It would be more common to be less than six months.

Q. Thank you.

Doctor, just to clarify, I'm looking at the designations of the columns on both Exhibits D and E. Would "DOE" refer to date of entry, "DOB", date of birth, "DOD", date of departure?

A. I did not make the list up.

MR. O'MALLEY: I can stipulate "DOE" is date of enlistment, "DOB", date of birth and "DOD" --

THE WITNESS: Date of discharge.

Q. Earlier in your testimony, Colonel, you indicated that in the case of reinlistment physical and in the case of

the annual physical after age 40 you reviewed the medical records and made a determination as to whether the disability was temporary or permanent. Did you make this determination prior to communicating the disability to the Commissioner of Public Safety or after you communicated it to him?

[47]

A. Prior. It's all done at one time. At the time I communicate the disability I note whether it's permanent or temporary.

Q. Okay, thank you.

So that in permitting members with permanent disabilities to serve on waiver, he has the benefit of your professional medical opinion that, in permitting these individuals to continue to serve, that their physical condition is such as to impair the full performance of their duties?

A. That would be correct.

Q. Okay.

Is it possible for an individual to continue to serve as a member of the State Police force, Colonel Murphy, with more than one physical defect under more than

one waiver?

A. (no answer)

Q. In other words, could it be possible with a man with hypertension and a hernia to be serving?

A. Well, I'd say anything is possible, but that would be up to the Commissioner.

Q. Now, what does the term "full duty status" mean, or is that an improper term?

A. No, "full duty status" means to me that an individual must be capable of performing all duties of a State Police officer.

Q. And under what circumstances would a determination be made as to whether a person is entitled to resume full duty status? Would this be where a fellow was put on a status less than full duty and at some point in time his physical condition is reviewed to determine whether it is?

A. Certainly.

Q. Fine; and in the case of a return to full duty status, would a physical exam be conducted by one of your medical staff and would you then review the results of that physical exam before certifying a

man back to full duty status?

A. Generally, as far as returning him to full duty status goes, I conduct an examination myself.

Q. Is a physical examination required in connection with promotions within the Uniformed Branch of the State Police?

A. Not to my knowledge.

Q. So, then, physical ability to perform the duties of a State Policeman or the duties to which an individual might be promoted is not a significant consideration to the extent that a speeific physical examination is conducted and relied upon before a promotion is granted?

[49]

A. No.

Q. I may have asked this question beofe, Colonel. Are you generally familiar with the duties of the Detective Division of the State Police?

A. I have some familiarity with it, but I would not consider myself an expert in the Detective Branch at all.

Q. Do you consider yourself to have a sufficient familiarity with the duties of both branches to say that the physical stresses involved in the performance of

the duties of one branch is significantly greater than those in the other?

A. Yes.

Q. And what would that medical opinion be?

A. That as far as the Detective Branch goes, the function is primarily investigative. This means that their time can be programmed. As far as the Uniformed Branch, they may be exposed to stress at any hour of the day or night.

Q. Now, Colonel, do you have any personal knowledge of an individual presently serving with the Uniformed Division of the State Police who has undergone open heart surgery?

[50]

A. The individual you are referring to did not undergo open heart surgery.

Q. Okay, could you please --

Off the record.

(Discussion off the record)

Q. On the record, could you --

A. The individual you are referring to had a repair of an aneurysm of the aorta, which is very different from heart surgery.

Q. For my benefit, could you please

describe the condition that you have referred to as an aneurysm of the aorta?

A. Right, this is a weakening of the wall of the artery, and once it is repaired you are better off than when you were born.

Q. This is a weakening of the wall of any artery connected with the heart or a particular artery?

A. No, a weakening of any artery is known as an aneurysm. This particular artery is the main artery coming out of the heart.

Q. So that in the case of the individual that we are talking about, the operation was to correct a defect or to strengthen the wall of the main artery coming into the heart?

A. Right, which was caused -- or the occasion for the operation was the result of a cruiser accident in striking his chest against the steering wheel.

[51]

Q. At the time of this accident, approximately how old was the individual that we're referring to?

A. 46, 47 would be my guess.

Q. And in what year did the accident

take place?

A. About two years ago, I believe.

Q. Of course, the operation would have taken place --

A. Within that time.

Q. -- in the same period of time?

A. (No answer)

Q. Could you describe the surgery involved in strengthening the wall of the main artery to the heart as was done in the case of this individual?

A. Yes. Normally what you do is you excise the area which is weak and then take a dacron or prostheses, which is a synthetic artery, and put it in place of the portion you have excised.

Q. And do you recall how long a period of time the individual in question was hospitalized?

A. I do not recall how long he was hospitalized, no.

Q. Do you know where he was hospitalized?

A. Well, he was hospitalized in two different hospitals, but I believe eventually he was operated on at the Massachusetts General Hospital.

[52]

Q. Now, Colonel, as State Police

Surgeon have you had occasion to review the medical records of Colonel Murgia?

A. I have.

Q. And on the basis of the reviews of those records that you have conducted, do you have a general medical opinion of his state of health on the date of his retirement, which was, I believe, in July of 1972?

A. I would say the last time that I examined him, which was in March, I believe, of 1972, on the type of examination we did he showed no defects other than presbyopia, which is something that comes with age.

Q. And what type of a condition is this?

A. That is where you lose your near vision and have mildly elevated systolic blood pressure. It was the upper limit of normal. Other than that, I would consider him, for a 50-year-old man, to be in excellent condition.

Q. Do you have a medical opinion, Colonel Murphy, as to the mandatory age requirement of 50 as set forth in the statute?

A. Yes, I do.

[53]

Q. Could you state that opinion for the record?

A. My opinion, looking at --

Q. Medical opinion.

A. Medical opinion now, as far as the types of duties which members of the Uniformed Branch are involved, and this is reflected in the fact that come age 40 we start watching them more closely, I would prefer to see them require 20 years' service or age 50, whichever came earlier.

Q. As opposed to whichever came later?

A. Right.

Q. And could you state your reason for this?

A. The basic reason for it is the increased incidents we see of cardiovascular disease between age 40 and 50.

Q. Would you then say that no man over 50 could adequately or capably perform the duties of a State Policeman?

A. No, no way would I ever say that. There is always the exception.

Q. Would it be possible to conduct a physical examination which could determine whether a given individual regardless of his age but, in particular, an individual

over 50 to determine whether that individual possessed sufficient health to permit him to adequately perform the duties of a State Trooper?

A. Well, I know of no medical examination that can predict the future. There are certain tests that could be done that would give you a guess, but that's all.

Q. But would it not be possible to ascertain that on a given date, as a result of certain physical examinations and tests conducted, that this individual over 50 is as capable of performing the duties of a State Trooper as anyone else might be on the basis of the same physical examination?

A. I would say that I would have to disagree with that statement in that an individual at age 50 is 25 years older than when he was 25. Therefore, he does not have the same stamina and flexibility of his cardiovascular system that he had when he was 25.

Q. Do you have a medical opinion, Colonel Murphy, on the basis of your experience as to the rate of aging that one experiences? Is this rate of aging, for

instance, significantly greater between the ages of 55 to 60 than it is between the ages of 50 to 55?

A. Well, there are two answers to that question. You are asking basically about rate of aging. I would like to answer first about aging. Aging starts in your twenties. Now, the rate of aging has been shown by the Surgeon General's office to progress more rapidly from age 40 on.

[55]

Q. But if we were to look at a curve, would not the dramatic increase come at least above the age of 55 as opposed to below the age of 55 and, indeed, quite possibly above the age of 60 or 65?

A. Well, are you talking aging now or disease?

Q. Well, maybe you could make the distinction far better than I.

A. I mean, the aging process does not necessarily mean that you have a disease.

Q. But it could involve disease?

A. Right, and statistics do show that once you hit age 40 your incidence of cardiovascular disease increases and the

statistics that we have on the Massachusetts State Police indicate that their incidence of cardiovascular disease from age 40 to 50 is what you find in the general population. If you carry that from 50 beyond, I would expect the rate to increase, but I don't have any figures that would show that.

Q. Are you familiar with the terms "functional age" and "chronological age"?

A. Yes.

Q. Could you please tell us what those terms mean to you?

A. Chronological age is based upon your date of birth.

[56]

Q. Functional age?

A. Functional age is based upon your ability to perform both mentally and physically.

Q. Okay.

Would it be possible for an individual of age 50, let us say, to have a chronological-- or "functional" age, rather, of less than 50 in terms of the performance of a given set of duties?

A. Anything is possible.

Q. Would that situation be rare?

A. Yes.

MR. LUCEY: No more questions.

CROSS EXAMINATION

BY MR. O'MALLEY:

Q. Colonel Murphy, in formulating your judgment that the incidence of heart disease is greater after the age of 40 and the rate of increase is greater, did you rely upon your specific experience with the State Police?

A. Yes.

Q. How important was that experience in making that judgment?

A. Well, the reason I took the figures for the State Police was I wanted to compare them against known figures

[57]

for the general population, and it turned out to be significantly greater.

Q. Would you have been able to reach that conclusion by merely reading the results and regulations of the State Police as opposed to actually having that experience?

A. No, these are based upon actually counting heads.

Q. Do you think a medical expert who didn't have your particular experience at

the State Police would be able to reach that same conclusion merely by reading the rules and regulations?

A. I don't see how he would have any way of having that information.

Q. Concerning the relevance of medical stress factors to the development of coronary disease, have you run into any specific examples, without naming any names, where these factors have manifested themselves in terms of coronary disease?

A. Are you talking coronary disease now or hypertension or cardiovascular disease?

Q. Perhaps, to define it, is hypertension a coronary disease?

A. No, that would be cardiovascular disease.

Yes, I have.

Q. All right.

[58]

Will you describe the example without naming any names?

A. All right, I will describe an individual who is 29 years old who was exposed to a very stressful situation which involved an investigation of himself. He became quite mentally anguished

about it, was subsequently hospitalized. During his period of hospitalization, his blood pressure was in the range of 180 to 220 over approximately 120 to 130. This blood pressure stayed in that range for several weeks. On correction of the stressful aspect of the situation his blood pressure returned to normal.

Now, this is not a true case of hypertension. But what could happen here, if the stress situation had been maintained and the blood pressure remained in that area, this would cause disease to the arteries which, in turn, would then become hypertension.

Q. Would the nature of the strict discipline of the State Police possibly add a mental stress factor?

A. That was one of the -- or, probably, the precipitating incidence of this case.

Q. Would the fact that a State Policeman is on 24-hours' call and has various hours of duty possibly involve mental stress factors?

[59]

A. There is no question that it does. I can refer to another individual

who, because of the fact that he must work given shifts and is then subject to call, has developed stress problems.

Q. Would these mental stress factors interrelate with the physical stress factors together?

A. They certainly would. If you are all alone at 3:00 o'clock in the morning at the accident scene and you have got three or four bodies, you have got physical and mental stress.

Q. Colonel Murphy, have you had any experience with a military or quasi-military organization other than the State Police?

A. Yes, I have.

Q. Would you describe your position with them?

A. Yes.

I have been a member of the Massachusetts National Guard for 20 years. I have been for, let's see, five years senior medical officer. My additional responsibilities are to review the medical condition of all military personnel in the National Guard.

I'm a member of the Death and Injury Board of the Commonwealth, which

passes on disability claims.

And I am the Senior National Guard Medical Officer who sits on all 1st Army Physical Fitness Board for National Guard Personnel.

I am also responsible for enforcing all federal regulations pertaining

[60]

to medical fitness for National Guard personnel.

Q. Based on this experience, have you formed any medical opinion as to the relationship of age to fitness performed to functions of the National Guard?

A. Yes.

First of all, we have regulations we have to go by. As far as the range of Lieutenant Colonel goes, mandatory retirement from any position is at age 53. As far as being in a position of, let's say, Battalion Commander, which I think is a good analogy for the State Police, the recommended age is 45. After that you would move into a staff position.

Q. Why would you say the Battalion Commander is analogous to the State Police position?

A. Because to me the State Police

are basically a backup force. They have to contend with riots, and it's very similar to having to take what we call a maneuver or combat battalion into a combat-type situation.

Q. Could you produce the regs. where these age limits are proscribed?

[61]

A. Yes, I can. National Guard Regulation 600-100.

MR. O'MALLEY: Off the record

(Discussion off the record)

Q. On the record, will you describe that regulation in particular?

A. Basically, this refers to an assignment of officers, and what it states is:

(Reading) Officers in TOE -- that is, Table of Organization & Equipment -- are expected to be of suitable age for their positions on mobilization. It is realized that age alone is not always a valid criterion in determining suitability for a position. Consequently, much depends on the type of unit and the individual's ability, knowledge, skill, experience, vigor and general value to the service. As a general rule, however, officers

should not be assigned to TOE units if their age exceeds that shown below. Officers now holding TOE positions will not be removed solely because their ages exceed that shown. (end reading)

Q. Would you describe the meaning of the initials you used in there?

A. Table of Organization and Equipment. All that means is this is how

[62]

-- this is a description of how the unit is organized, in other words, an infantry battalion, signal battalion, these all have what we call TOE's.

Q. Can we have a copy of that?

Off the record.

(Discussion off the record)

MR. O'MALLEY: Would you mark that Exhibit F?

(A document entitled at the top "NGR 600-100" was marked Exhibit F.)

Q. And you are familiar with the examinations given to the National Guard members?

A. Certainly am. We do approximately 8,000 a year.

Q. How do they compare with the exams given to the State Police officers?

A. They are exactly the same.

Q. Is there a strength requirement?

A. Are you talking physical strength requirement for Guardsmen?

Q. Yes.

A. No, there is not.

Q. Is there one for the State Police?

A. Yes, there is.

You are talking about initial application?

Q. Right.

[63]

A. Right.

Q. Is the National Guard essentially an infantry-type unit?

A. In this state it is, yes.

Q. Colonel, if a State Police officer around the age of 50 passed your medical exam, your annual medical exam, but indicated a blood pressure with a systolic of 145 and a diastolic of 98, what kind of recommendation would you make for his duty?

A. A single blood pressure reading would mean nothing. I would recommend it be repeated on several different occasions to be sure we did not have incipient hypertension.

Q. If it were demonstrated that this blood pressure was a general historical physical indication, what would your recommendation be then?

A. If he were overweight, weight reduction, possibly assault and battery restriction.

Q. With respect to his duty --

A. And --

Q. With respect to his duty status?

A. At that point he would not be put on any light duty status, he would still be on full duty status.

Q. Have you formed a medical opinion as to whether an average State Police officer at the age of 40 [The parties on the court-filed copies corrected 40 to read 50.] is physically fit to perform

[64]

the full duty status of a State Police officer?

A. Yes.

Q. What is that opinion?

A. I do not believe they are.

Q. Would you state the basis for that opinion?

A. The basis for that opinion is coming again down to the fact that at age

50 I'm worried, if you have got a State Trooper going into Walpole, again because of age.

Q. What are some of the possibilities medically speaking of someone suffering from a cardiovascular attack or manifestation of abnormality or whatever, whatever the medical term is, once he goes in to suppress a prison riot?

A. At the age of 50 they are much much greater than it would be at the age of 25.

Q. And describe some of them.

A. Well, the most common one in a situation like Walpole for the acute phase would be myocardial infarction, or heart attack. On a sustained type of operation, which let's again go back to Walpole, where that went on for several months, here is where, because it's a prolonged period of time, you'd be more apt to see hypertension.

[65]

Q. Would that apply to a higher ranking officer as well as a trooper?

A. I would say the higher ranking officer is even more susceptible because he also has the additional problem of

responsibility.

Q. Have officers of higher rank performed that duty within your knowledge?

A. Yes.

MR. O'MALLEY: I don't have anything else right now.

May I ask a couple more questions? I said I was through, but may I ask a couple more?

Q. Does the nature of your examination, annual examination, after the age of 40 depend upon in any way the actual range of the individual being examined?

A. No.

Q. How about under 40?

A. Range would have no effect on examination.

Q. Will you describe the types of physicians or specialties involved of those who served under you when various examinations are given?

A. Every specialty is covered with the exception of pediatrics and obstetrics.

Q. Would you list some of the more common specialties?

A. Surgeons, internists, neurologists, ophthalmologists, radiologists,

[66]

urologists.

Q. Is a cardiologist involved?

A. That would be the internist.

Q. And it's also correct that you perform many of these examinations yourself?

A. Are we talking State Police now?

Q. State Police examinations, correct.

A. No, the bulk are done by these people because of the numbers that are involved.

Q. And you review all of them?

A. I review all, right.

Q. How about examinations given when people have gone on leave because of physical problems?

A. Those I would see myself.

MR. O'MALLEY: That's all.

MR. CITY: If I may, I would like to ask a few questions on redirect.

REDIRECT EXAMINATION

BY MR. CITY:

Q. As I understand it, the medical examinations for all members of the Uniformed Branch are the same, the medical requirements are the same regardless of

[67]

actual duties that they perform is that correct?

A. That would be correct.

Q. You assume that a man will be required to do the most onerous duties, will be called to perform the most onerous duties that can be called upon regardless of his range?

A. That is correct, that he could be.

Q. Would a Lieutenant Colonel be required to go into Walpole, inside the prison, and engage in hand-to-hand activity?

A. Yes.

Q. Would he be likely to be driving along Route 495 at 2:00 a.m. in the morning and discover a fatal accident?

A. Very possible.

Q. In your testimony here you tended to compare the 25-year old man with the 50-year old man, and your testimony I believe was that the 25-year old man was far more fit than the 50-year old man to perform these duties.

A. As a general statement, yes.

Q. As a general rule.

Now, sir, I would like to direct your attention to the ages that occur

between 25 and 50, at age 30, 40, 45 and 50, and I would like you to comment about your feelings as a general rule of a man's

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ability at age 30 and so forth.

A. As each year goes by, an individual, depending upon his motivation, depending upon how he is going to maintain his physical condition, but as each year goes by it becomes more difficult to maintain a high level of physical proficiency. This is the normal aging process.

Now, if you are out of shape at age 30, it's going to take you longer to get back into shape than if you were age 21 or age 25. The same applies at age 35.

And then, when you get up to age 40 and beyond it becomes an extremely difficult task because by this time you have lost the elasticity of the cardiovascular tree, which I think is the key to the whole point.

Q. So that your feeling, I take it, is that men from the age of 40 who do not take good physical care of themselves are less efficient and less able to perform the duties that are required of a State Trooper; is that correct?

A. No. What I am saying is that a man at age 40 who has not maintained himself in top flight condition is going to find it almost impossible to get back in top flight condition.

Q. How is a man who has maintained himself in top flight condition at age 40 able to perform his duties as a State Trooper as compared to a man at age 25 in a similar condition?

A. The man at age 25 always has the advantage.

Q. Is there any significant distinc-

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tion in your mind between a man in top flight condition at age 45 then a man in a similar condition at age 50?

A. Yes, he's five years older.

Q. In your examination of Colonel Murgia in March of 1972 prior to his retirement, was he capable of performing the duties of a State Policeman?

A. Yes.

MR. CITY: That is all we have.

RECROSS EXAMINATION

BY MR. O'MALLEY:

Q. Colonel, would you indicate the range of normality in a blood pressure

measurement?

A. Well, in general, the figures that are utilized, I do not like to see the systolic above 140 or the diastolic above 90. You do not become concerned, overly concerned, about a hypertensive state until your diastolic is persistenly shown to be around a hundred.

MR. O'MALLEY: That's all.

(Whereupon, the deposition adjourned at 1:10 o'clock p.m.)

[REPORTER'S CERTIFICATE OMITTED IN PRINTING.]

[JURAT OMITTED IN PRINTING.]

[EXHIBITS, EXCEPT FOR EXHIBIT A-3, OMITTED IN PRINTING.]

[EXHIBIT A-3]

MEDICAL FITNESS STANDARDS FOR INITIAL APPOINTMENT TO THE MASSACHUSETTS STATE POLICE

(Short Title: Procurement Medical Fitness Standards)

2-1. SCOPE

This chapter sets forth the medical conditions and physical defects which are cause for rejection for initial appointment as a Massachusetts State Police Officer.

2-2. Applicability

These standards apply to all male and female applicants for initial appointment to the Uniformed Branch of the Massachusetts State Police. These standards are applicable until the individual has completed a minimum of 120 days satisfactory service as a State Police Officer.

Section II. ABDOMEN AND GASTROINTESTINAL SYSTEM

2-3. Abdominal Organs and Gastrointestinal System

The causes for rejection for appointment, enlistment, ~~and induction are~~

a. Cholocystectomy, sequelae of, such as post-operative stricture of the

common bile duct, reforming of stones in hepatic or common bile ducts, or incisional hernia, or postcholecystectomy syndrome when symptoms are so severe as to interfere with normal performance of duty.

b. Cholecystitis, acute or chronic, with or without cholelithiasis, if diagnosis is confirmed by usual laboratory procedures or authentic medical records.

c. Cirrhosis regardless of the absence of manifestations such as jaundice, ascites or known esophageal varices, abnormal liver function tests with or without history of chronic alcoholism.

d. Fistula in ano.

e. Gastritis, chronic hypertrophic, severe.

f. Hemorrhoids.

(1) External hemorrhoids producing marked symptoms.

(2) Internal hemorrhoids, ~~if large or~~ accompanied with hemorrhage or protruding intermittently or constantly.

g. Hepatitis within the preceding 6 months, or persistence of symptoms after a reasonable period of time with objective evidence of impairment of liver function.

h. Hernia:

(1) Hernia other than small asymptomatic umbilical or hiatel.

(2) History of operation for hernia within the preceding 60 days.

i. Intestinal obstruction or authenticated history of more than one episode, if either occurred during the preceding 5 years or if resulting condition remains which produces significant symptoms or requires treatment.

j. Megacolon of more than minimal degree, diverticulitis, regional enteritis, and ulcerative colitis. Irritable colon of more than moderate degree.

k. Pancreas, acute or chronic disease of, if proven by laboratory tests, or authenticated medical records.

l. Rectum, stricture or prolapse of.

m. Resection, gastric or of bowel; or gastroenterostomy; however minimal intestinal resection in infancy or childhood (for example: for intussusception or pyloric stenosis) is acceptable if the individual has been asymptomatic since the resection and if surgi-

cal consultation (to include upper and lower gastrointestinal series) gives complete clearance.

n. Scars.

(1) Scars, abdominal, regardless of cause, which shown hernial bulging or which interfere with movements.

(2) Scar pain associated with disturbance of function of abdominal or contained viscera.

o. Sinuses of the abdominal wall.

p. Splenectomy, except when accomplished for the following:

(1) Trauma.

(2) Causes unrelated to diseases of the spleen.

(3) Hereditary spherocytosis.

(4) Disease involving the spleen when followed by correction of the condition for a period of at least 2 years.

q. Tumors. See paragraphs 2-40 and 2-41.

r. Ulcer:

(1) Ulcer of the stomach or duodenum if diagnosis is confirmed by X-ray examination, ~~or authenticated history thereof~~.

~~(2) Authentic history of surgical operation(s) for gastric or duodenal ulcer.~~

s. Other congenital or acquired abnormalities and defects which preclude satisfactory performance of ~~military~~ duty or which require frequent and prolonged treatment.

Section III. BLOOD AND BLOOD-FORMING TISSUE DISEASES

2-4. Blood and Blood-Forming Tissue Diseases

The causes for rejection for appointment, enlistment and induction are--

a. Anemia:

(1) Blood loss anemia--until both condition and basic cause are corrected.

(2) Deficiency anemia, not controlled by medication.

(3) Abnormal destruction of RBC's: Hemolytic anemia.

(4) Faulty RBC construction: Hereditary hemolytic enemia, thallassemia, and sickle cellanemia.

(5) Myclophthisic anemia: Myclomatosis, leukemia, Hodgkin's disease.

(6) Primary refractory anemia: Aplastic anemia, DiGuglielmo's syndrome.

b. Hemorrhagic states:

(1) Due to changes in coagulation system (hemophilia, etc.).

(2) Due to platelet deficiency.

(3) Due to vascular instability.

c. Leukopenia, chronic or recurrent, associated with increased susceptibility to infection.

d. Mycloproliferative disease (other than leukemia):

(1) Myelofibrosis.

(2) Megakaryocytic myelosis.

(3) Polycythemia vera.

e. Splenomegaly until the cause is remedied.

f. Thromboembolic disease except for acute, nonrecurrent conditions.

Section IV. DENTAL

2-5. Dental

The cause for rejection for appointment, enlistment, and induction are--

a. Diseases of the jaws or associated tissues which are not easily remediable and which will incapacitate the individual or prevent the satisfactory performance of ~~military~~ duty.

b. Malocclusion, severe, which interferes with the mastication of a normal diet.

c. Oral tissues, extensive loss of, in an amount that would prevent replacement of missing teeth with a satisfactory prosthetic appliance.

~~d. Orthodontic appliances. See special administrative criteria in paragraph 7-12.~~

e. Relationship between the mandible and maxilla of such a nature as to preclude future satisfactory prosthodontic replacement.

Section V. EARS AND HEARING

2-6. Ears

The causes for rejection for appointment, enlistment, ~~and induction are--~~

a. Auditory canal:

(1) Atresia or severe stenosis of the external auditory canal.

BEST COPY AVAILABLE

(2) Tumors of the external auditory canal except mild exostoses.

(3) Severe external otitis, acute or chronic.

b. Auricle: Agenesis, severe; or severe traumatic deformity, unilateral or bilateral.

c. Mastoids:

(1) Mastoiditis, acute or chronic.

(2) Residual or mastoid operation with marked external deformity which precludes or interferes with the wearing of a gas mask or helmet.

(3) Mastoid fistula.

d. Meniere's syndrome.

e. Middle ear:

(1) Acute or chronic suppurative otitis media. Individuals with a recent history of acute suppurative otitis media will not be accepted unless the condition is healed and a sufficient interval of time subsequent to treatment has elapsed to insure the disease is in fact not chronic.

(2) Adhesive otitis media associated with hearing level by audiometric test of 20 db or more average for the

frequencies (500, 1000, and 5000 cycles per second) in either ear regardless of the hearing level in the other ear.

(3) Acute or chronic serous otitis media.

(4) Presence of attic perforation in which presence of cholesteatoma is suspected.

(5) Repeated attacks of catarrhal otitis media; intact greyish, thickened drum(s).

f. Tympanic membrane:

*(1) Any perforation of the tympanic membrane.

*Significant

(2) Severe scarring of the tympanic membrane associated with hearing level by audiometric test of 20 db or more average for the speech frequencies (500, 1000, and 2000 cycles per second) in either ear regardless of the hearing level in the other ear.

g. Other diseases and defects of the ear which obviously preclude satisfactory performance of duty or which require frequent and prolonged treatment.

2-7. Hearing.
(See also para. 2-6.)
The cause for rejection for appointment, enlistment, ~~and induction is--~~

Hearing acuity level by audiometric testing (regardless of conversational or whispered voice hearing acuity) greater than that described in table I, appendix II. ~~There is no objection to conducting the whispered voice test or the spoken voice test as a preliminary to conducting the audiometric hearing test.~~

Section VI. ENDOCRINE AND METABOLIC DISORDERS

*2-8. Endocrine and Metabolic Disorders
The causes for rejection for appointment, enlistment, and induction are --

a. Adrenal gland, malfunction of, of any degree.

b. Cretinism.

c. Diabetes insipidus.

d. Diabetes mellitus.

e. Gigantism or acromegaly.

f. Glycosuria, persistent, regardless of cause.

g. Goiter;

(1) Simple goiter with definite pressure symptoms or so large in size as to interfere with the wearing of a ~~military~~ uniform or ~~military~~ equipment.

(2) Thyrotoxicosis.

h. Gout.

i. Hyperinsulinism, confirmed, symptomatic.

j. Hyperparathyroidism and hypoparathyroidism.

k. Hypopituitarism, severe.

l. Myxedema, spontaneous or postoperative (with clinical manifestations and not based solely on low basal metabolic rate).

m. Nutritional deficiency diseases (including sprue, beriberi, pellagra, and scurvy) ~~which are more than mild and not readily remediable or in which permanent pathological changes have been established.~~

n. Other endrocrine or metabolic disorders which obviously preclude satisfactory performance of duty or which require frequent and prolonged treatment.

Section VII. EXTREMITIES

2-9. Upper Extremities.

(See para. 2-11)

The causes for rejection for appointment, enlistment, and induction are--

a. Limitation of motion. An individual will be considered unacceptable if the joint ranges of motion are less than the measurements listed below (app. IV).

(1) Shoulder:

(a) Forward elevation to 90°.

(b) Abduction to 90°.

(2) Elbow:

(a) Flexion to 100°

(b) Extension to 15°.

(3) Wrist: A total range of 15° (extension plus flexion).

(4) Hand: Pronation to the first quarter of the normal arc.

Supination to the first quarter of the normal arc.

(5) Fingers: Inability to clench fist, pick up a pin or needle, and grasp an object.

b. Hand and fingers:

(1) Absence (or loss) of more than 1/3 of the distal phalanx of either thumb.

(2) Absence (or loss) of distal and middle phalanx of an index, middle or ring finger of either hand irrespective of the absence (or loss) of little finger.

(2.1) Absence of more than the distal phalanx of any two of the following fingers, index, middle finger or ring finger, of either hand.

(3) Absence of hand or any portion thereof, except for fingers as noted above.

(4) Hyperdactylia.

(5) Scars and deformities of the fingers and/or hand which impair circulation, are symptomatic, are so disfiguring as to make the individual objectionable in ordinary social relationships, or which impair normal function to such a degree as to interfere with the satisfactory performance of ~~military~~ duty.

c. Wrist, forearm, elbow, arm, and shoulder: Healed disease or injury of

wrist, elbow, or shoulder with residual weakness or symptoms of such a degree as to preclude satisfactory performance of duty.

2-10. Lower Extremities

(See para. 2-11.)

The causes for rejection for appointment, enlistment, and induction are--

a. Limitation of motion. An individual will be considered unacceptable if the joint ranges of motion are less than the measurements listed below (app. IV).

(1) Hip.

(a) Flexion to 90°.

(b) Extension to 10° (beyond 0).

(2) Knee.

(a) Full extension.

(b) Flexion to 90°.

(3) Ankle.

(a) Dorsiflexion to 10°.

(b) Plantar flexion to 10°.

(4) Toes. Stiffness which interferes with walking, marching, running, or jumping.

b. Foot and ankle.

(1) Absence of one or more small toes of one or both feet, if function of the foot is poor or running or jumping is precluded, or absence of foot or any portion thereof except for toes as noted herein.

(2) Absence (or loss) of great toe(s) or loss of dorsal flexion thereof if function of the foot is impaired.

(3) Claw toes precluding the wearing of ~~combat~~ service boots.

(4) Clubfoot.

(5) Flatfoot, pronounced cases, with decided eversion of the foot and marked bulging of the inner border, due to inward rotation of the astragalus, regardless of the presence or absence of symptoms.

(6) Flatfoot, spastic.

(7) Hallux valgus, if severe and associated with marked exostosis or bunion.

(8) Hammer toe which interferes with the wearing of ~~combat~~ service boots.

(9) Healed disease, injury, or deformity including hyperdactylia which

precludes running, is accompanied by disabling pain, or which prohibits wearing of ~~combat~~ service boots.

(10) Ingrowing toe nails, if severe, and not remediable.

(11) Obliteration of the transverse arch associated with permanent flexion of the small toes.

(12) Pes cavus, with contracted plantar fascia, dorsiflexed toes, tenderness under the metatarsal heads, and callosity under the weight bearing areas.

c. Leg, knee, thigh, and hip.

(1) Dislocated, semilunar cartilage, loose or foreign bodies within the knee joint, or history of surgical correction of same if--

(a) Within the preceding 6 months.

(b) Six months or more have elapsed since operation without recurrence, and there is instability of the knee ligaments in lateral or anteroposterior directions in comparison with ~~with~~ the normal knee or abnormalities noted on X-ray, there is significant atrophy or weakness of the thigh muscula-

ture in comparison with the normal side, there is not acceptable active motion in flexion and extension, or there are other symptoms of internal derangement.

(2) Authentic history or physical findings of an unstable or internally deranged joint causing disabling pain or seriously limiting function. Individuals with verified episodes of buckling or locking of the knee who have not undergone satisfactory surgical correction or if, subsequent to surgery, there is evidence of more than mild instability of the knee ligaments in lateral and anteroposterior directions in comparison with the normal knee, weakness or atrophy of the thigh musculature in comparison with the normal side, or if the individual requires medical treatment of sufficient frequency to interfere with the performance of ~~military~~ duty.

d. General

(1) Deformities of one or both lower extremities which have interfered with function to such a degree as to prevent the individual from following a

physically active vocation in civilian life or which would interfere with the satisfactory completion of prescribed training and performance of military duty.

(2) Diseases or deformities of the hip, knee, or ankle joint which interfere with walking, running, or weight bearing.

(3) Pain in the lower back or leg which is intractable and disabling to the degree of interfering with walking, running, and weight bearing.

(4) Shortening of a lower extremity resulting in any limp of noticeable degree,

2-11. Miscellaneous

(See also para. 2-9 and 2-10.)

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Arthritis.

(1) Active or subacute arthritis, including Marie-Strumpell type.

(2) Chronic osteoarthritis or traumatic arthritis of isolated joints of more than minimal degree, which has interfered with the following of a

physically active vocation in civilian life or which precludes the satisfactory performance of military duty.

(3) Documented clinical history of rheumatoid arthritis.

(4) Traumatic arthritis of a major joint of more than minimal degree.

b. Disease of any bone or joint healed, with such resulting deformity or rigidity that function is impaired to such a degree that it will interfere with ~~military~~ service.

c. Dislocation, old unreduced; substantiated history of recurrent dislocations of major joints; instability of a major joint, symptomatic and more than mild; or if, subsequent to surgery, there is evidence of more than mild instability in comparison with the normal joint, weakness or atrophy in comparison with the normal side, or if the individual requires medical treatment of sufficient frequency to interfere with the performance of ~~military~~ duty.

d. Fractures.

(1) Malunited fractures that interfere significantly with function.

(2) Ununited fractures.

(3) Any old or recent fracture in which a plate, pin, or screws were used for fixation and left in place and which may be subject to easy trauma, i.e., as a plate tibia, etc.

e. Injury of a bone or joint within the preceding 6 weeks, without fracture or dislocation, of more than a minor nature.

f. Muscular paralysis, contracture, or atrophy, if progressive or of sufficient degree to interfere with ~~military~~ service.

f.1. Myotonia congenita. Confirmed.

g. Osteomyelitis, active or recurrent, of any bone or substantiated history of osteomyelitis of any of the long bones unless successfully treated 2 or more years previously without subsequent recurrence or disqualifying sequelae as demonstrated by both clinical and X-ray evidence.

h. Osteoporesis.

i. Scars, extensive, deep, or adherent, of the skin and soft tissues or neuromas of an extremity which are

painful, which interfere with muscular movements, which preclude the wearing of ~~military~~ equipment, or that show a tendency to break down.

*j. Chondromalacia, manifested by verified history of joint effusion, interference with function, or residuals from surgery.

Section VIII. EYES AND VISION

2-12. Eyes

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Lids.

(1) Blepharitis, chronic more than mild. Cases of acute blepharitis will be rejected until cured.

(2) Blepharospasm.

(3) Dacryocystitis, acute or chronic.

(4) Destruction of the lids, complete or extensive, sufficient to impair protection of the eye from exposure.

(5) Disfiguring cicatrices and adhesions of the eyelids to each other or to the eyeball.

(6) Growth or tumor of the eyelid other than small early basal cell tumors of the eyelid, which can be cured by treatment, and small nonprogressive asymptomatic benign lesions. See also paragraphs 2-40 and 2-41.

(7) Marked inversion or eversion of the eyelids sufficient to cause unsightly appearance or watering of eyes (entropion or ectropion).

(8) Lagophtalmos.

(9) Ptosis interfering with vision.

(10) Trichiasis, severe.

b. Conjunctiva.

(1) Conjunctivitis, chronic, including vernal catarrh and trachoma. Individuals with acute conjunctivitis are unacceptable until the condition is cured.

(2) Pterygium:

(a) Pterygium recurring after three operative procedures.

(b) Pterygium encroaching on the cornea in excess of 3 millimeters or interfering with vision.

c. Cornea.

(1) Dystrophy, corneal, of any type including keratoconus of any degree.

(2) Keratitis, acute or chronic.

(3) Ulcer, corneal; history of recurrent ulcers or corneal abrasions (including herpetic ulcers).

(4) Vascularization or opacification of the cornea from any cause which interferes with visual function or is progressive.

d. Uveal tract. Inflammation of the uveal tract except healed traumatic choroiditis.

e. Retina.

(1) Angiomatoses, phakomatoses, retinal cysts, and other congenito-hereditary conditions that impair visual function.

(2) Degenerations of the retina to include macular cysts, holes, and other degenerations (hereditary or acquired degenerative changes) and other conditions affecting the macula. All types of pigmentary degenerations (primary and secondary).

(3) Detachment of the retina or history of surgery for same.

(4) Inflammation of the retina (retinitis or other inflammatory conditions of the retina to include Coat's disease, diabetic retinopathy, Eales' disease, and retinitis proliferans).

f. Optic nerve.

(1) Congenito-hereditary conditions of the optic nerve or any other central nervous system pathology affecting function of the optic nerve.

(2) Optis neuritis, neuroretinitis, or secondary optic atrophy resulting therefrom or document history of attacks of retrobulbar neuritis.

(3) Optic atrophy (primary or secondary).

(4) Papilledema.

g. Lens.

(1) Aphakia (unilateral or bilateral).

(2) Dislocation, partial or complete, of a lens.

(3) Opacities of the lens which interfere with vision or which are considered to be progressive.

h. Ocular mobility and motility.

(1) Diplopia, documented, constant or intermittent from any cause or of any degree interfering with visual function (i.e., may suppress).

(2) Diplopia, monocular, documented, interfering with visual function.

(3) Nystagmus, with both eyes fixing, congenital or acquired.

(4) Strabismus of 40 prism diopters or more, uncorrectable by lenses to less than 40 diopters.

(5) Strabismus of any degree accompanied by documented diplopia.

(6) Strabismus, surgery for the correction of, within the preceding 6 months.

i. Miscellaneous defects and diseases.

(1) Abnormal conditions of the eye or visual fields due to diseases of the central nervous system.

(2) Absence of an eye.

(3) Asthenopia severe.

(4) Exophthalmus, unilateral or bilateral.

(5) Glaucoma, primary or secondary.

(6) Hemianopsia of any type.

(7) Loss of normal pupillary reflex

reactions to light or accommodation to distance or Adies syndrome.

(8) Loss of visual fields due to organic disease.

(9) Night blindness associated with objective disease of the eye. Verified congenital night blindness.

(10) Residuals of old contusions, lacerations, penetrations, etc., which impair visual function required for satisfactory performance of military duty.

(11) Retained intra-ocular foreign body.

(12) Tumors. See a(6) above and paragraphs 2-40 and 2-41.

(13) Any organic disease of the eye or adnexa not specified above which threatens continuity of vision or impairment of visual function.

2-13. Vision

The causes for medical rejection for appointment, enlistment, and introduction are listed below. The special administrative criteria for officer assignment to Armor, Artillery, Infantry, Corps of Engineers, Signal Corps, and Military Police Corps are listed in paragraph 7-15.

a. Distant visual acuity. Distant visual acuity of any degree which does not correct to at least one of the following:

(1) 20/40 in one eye and 20/70 in the other eye.

(2) 20/30 in one eye and 20/100 in the other eye.

(3) 20/20 in one eye and 20/400 in the other eye.

b. Near visual acuity. Near visual acuity of any degree which does not correct to at least J-6 in the better eye.

c. Refractive error. Any degree of refractive error in spherical equivalent of over -8.00 or +8.00; or if ordinary spectacles cause discomfort by reason of ghost images, prismatic displacement, etc.; or if an ophthalmological consultation reveals a condition which is disqualifying.

d. Contact lens. Complicated cases requiring contact lens for adequate correction of vision as keratoconus, corneal scars, and irregular astigmatism.

[Section 2-13 Vision (on this and preceding page, crossed out on original and the following language handwritten on that page: "Change this section to provide for 20/20 binocular vision. J-1 near

vision and Red-green color blindness."]

Section IX. GENITOURINARY SYSTEM

2-14. Gonitalia

(See also para 2-40 and 2-41.)

The causes for rejection for appointment, enlisted, ~~and induction are~~

a. Bartholinitis, Bartholin's cyst.

b. Cervicitis, acute or chronic manifested by leukorrhea.

c. Dysmonorrhea, incapacitating to a degree which necessitates recurrent absences of more than a few hours from routine activities.

d. Endometriosis, or confirmed history thereof.

e. Hermaphroditism.

f. Menopausal syndrome, either physiologic or artificial if manifested by more than mild constitutional or mental symptoms, or artificial menopause if less than 13 months have elapsed since cessation of menses. In all cases of artificial menopause, the clinical diagnosis will be reported; if accomplished by surgery, the pathologic report will be obtained and recorded.

g. Menstrual cycle, irregularities of, including menorrhagia, if excessive;

metrorrhagia; polymenorrhea; amenorrhea, except as noted in f above.

h. New growths of the internal or external genitalia except single uterine fibroid, subserous, asymptomatic, less than 3 centimeters in diamter, with no general enlargement of the uterus. See also paragraphs 2-40 and 2-41.

i. Oophoritis, acute or chronic.

j. Ovarian cysts, persistent and considered to be of clinical significance.

k. Pregnancy.

l. Salpingitis, acute or chronic.

m. Testicle(s). (See also para 2-40 and 2 41.)

(1) Absence or nondescent of both testicles.

(2) Undiagnosed enlargement or mass of testicle or epididymis.

(3) ~~Undescended testicle~~.

n. Urethritis, acute or chronic, other than gonorrheal urethritis without complications.

o. Uterus.

(1) Cervical polyps, cervical ulcer, or marked erosion.

(2) Endocervicitis, more than mild.

(3) Generalized enlargement of the

uterus due to any cause.

(4) malposition of the uterus if more than mildly symptomatic.

p. Vagina.

(1) Congenital abnormalities or severe lacerations of the vagina.

(2) Vaginitis, acute or chronic, manifested by leukorrhea.

q. Varicoccle or hydrocele, if large or painful.

r. Vulva.

(1) Leukoplakia.

(2) Vulvitis, acute or chronic.

s. Major abnormalities and defects of the genitalia such as a change of sex, a history thereof, or complications (adhesions, disfiguring scars, etc.) residual to surgical correction of these conditions.

2-15. Urinary System

(See para 2-8, 2-40, and 2-41).

The causes for rejection for appointment, enlistment, and induction are-

a. Albuminuria if persistent or recurrent including so-called orthostatic or functional albuminuria.

b. Cystitis, chronic. Individuals with acute cystitis are unacceptable until the condition is cured.

c. Enuresis determine to be a symptc of an organic defect not amenable to trea ment. (See also para 2-34c.)

d. Epispadias or hypospadias when ac panied by evidence of infection of the ur nary tract or if clothing is soiled when voiding.

e. Hematuria, cylindruria, or other findings indicative of renal tract disease

f. Incontinence of urine.

g. Kidney.

(1) Absence of one kidney, regardless of cause.

(2) Acute or chronic infections of the kidney.

(3) Cystic or polycystic kidney, confirmed history of.

(4) Hydronephrosis or pyonephrosis.

(5) Nephritis, acute or chronic.

(6) Pyelltis, pyelonephritis.

h. Penis, amputation of, if the resulting stump is insufficient to permit micturition in a normal manner.

i. Peyronie's disease.

j. Prostate glad, hyperthrophy of, with urinary retention.

k. Renal calculus.

(1) Substantiated history of bilateral renal calculus at any time.

(2) Verified history of renal calculus at any time with evidence of stone formation within the preceding 12 months, current symptoms or positive X-ray for calculus.

l. Skeneitis.

m. Urethra.

(1) Stricture of the urethra.

(2) Urethritis, acute or chronic, other than gonorrheal urethritis without complications.

n. Urinary fistula.

o. Other diseases and defects of the urinary system which obviously preclude satisfactory performance of duty or which require frequent and prolonged treatment.

Section X. HEAD AND NECK.

2-16. Head

The causes for rejection for appointment, enlistment, ~~and induction~~ are-

a. Abnormalities which are apparently temporary in character resulting from recent injuries until a period of 3 months has elapsed. These include severe contusions and other wounds of the scalp and cerebral concussion. See paragraph 2-31.

b. Deformities of the skull in the

nature of depressions, exostoses, etc., of a degree which would prevent the individual from wearing a gas mask or ~~military~~ headgear.

c. Deformities of the skull of any degree associated with evidence of disease of the brain, spinal cord, or peripheral nerves.

d. Depressed fractures near central sulcus with or without convulsive seizures.

e. Loss or congenital absence of the bony substance of the skull not successfully corrected by reconstructive material:

(1) All cases involving absence of the bony substance of the skull which have been corrected but in which the defect is in excess of 1 square inch or the size of a 25 cent piece, will be referred to The Surgeon General together with a report of consultation;

(2) The report of consultation will include an evaluation of any evidence of alteration of brain function in any of its several spheres, i.e., intelligence, judgment, perception, behavior, motor control and sensory function as well as any evidence of active bone disease or other related complications. Current X-rays and other pertinent laboratory data will

accompany such a report of consultation.

f. Unsightly deformities, such as large birthmarks, large hairy moles, extensive scars, and mutilations due to injuries or surgical operations; ulcerations; fistulae, atrophy, or paralysis of part of the face or head.

2-17. Neck

The causes for rejection for appointment, enlistment, ~~and induction~~ are-

a. Cervical ribs if symptomatic, or so obvious that they are found on routine physical examination. (Detection based primarily on X-ray is not considered to meet this criterion.)

b. Congenital cysts of branchial cleft origin or those developing from the remnants of the thyroglossal duct, with or without fistulous tracts.

c. Fistula, chronic draining, of any type.

*d. (Deleted)

e. Nonspastic contraction of the muscles of the neck or cicatrical contracture of the neck to the extent that it interferes with the wearing of a uniform or ~~military~~ equipment or so disfiguring as to make the individual

objectionable in common social relationships.

f. Spastic contraction of the muscles of the neck, persistent, and chronic.

g. Tumor of thyroid or other structures of the neck. See paragraphs 2-40 and 2-41.

Section XI. HEART AND VASCULAR SYSTEM

2-18. Heart

The causes for rejection for appointment, enlistment, ~~and induction are~~-

a. All organic valvular diseases of the heart, including those improved by surgical procedures.

b. Coronary artery disease or myocardial infarction, old or recent or true angina pectoris, at any time.

c. Electrocardiographic evidence of major arrhythmias such as--

(1) Atrial tachycardia, flutter, or fibrillation, ventricular tachycardia or fibrillation.

(2) Conduction defects such as first degree atrio-ventricular block and right bundle branch block. (These conditions occurring as isolated findings are not unfitting when cardiac evaluation reveals no cardiac disease.)

(3) Left bundle branch block, 2d and 3d degree AV block.

(4) Unequivocal electrocardiographic evidence of old or recent myocardial infarction; coronary insufficiency at rest or after stress; or evidence of heart muscle disease.

d. Hypertrophy or dilatation of the heart as evidenced by clinical examination or roentgenographic examination and supported by electrocardiographic examination. Care should be taken to distinguish abnormal enlargement from increased diastolic filling as seen in the well conditioned subject with a sinus bradycardia. Cases of enlarged heart by X-ray not supported by electrocardiographic examination will be forwarded to The Surgeon General for evaluation.

e. Myocardial insufficiency (congestive circulatory failure, cardian decompensation) obvious or covert, regardless of cause.

f. Paroxysmal tachycardia within the preceding 5 years, or at any time if recurrent or disabling or if associated with electrocardiographic evidence

of accelerated A-V conduction (Wolff-Parkinson-White).

*g. Pericarditis; endocarditis; or myocarditis, history or finding of, except for a history of a single acute idiopathic or coxsackic pericarditis with no residuals, or tuberculous pericarditis adequately treated with no residuals and inactive for 2 years.

h. Tachycardia persistent with a resting pulse rate of 100 or more, regardless of cause.

2-19. Vascular System

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Congenital or acquired lesions of the aorta and major vessels, such as syphilitic aortitis, demonstrable atherosclerosis which interferes with circulation, congenital or acquired dilation of the aorta (especially if associated with other features of Marfan's syndrome), and pronounced dilatation of the main pulmonary artery.

b. Hypertension evidenced by preponderant blood pressure readings of 150-mm or more systolic in an individual over 35 years of age or preponderant readings of 140-mm or more systolic in an indi-

vidual 35 years of age or less. Preponderant diastolic pressure over 90-mm diastolic is cause for rejection at any age.

c. Marked circulatory instability as indicated by orthostatic-hypotension, persistent tachycardia, severe peripheral vasomotor disturbances and sympathetico-tonia.

d. Peripheral vascular disease including Raynard's phenomena, Buerger's disease (thromoboangiitis obliterans), crythromelalgia, arteriosclerotic and diabetic vascular diseases. Special tests will be employed in doubtful cases.

e. Thrombophlebitis.

(1) History of thrombophlebitis with persistent thrombus or evidence of circulatory obstruction or deep venous incompetence in the involved veins.

(2) Recurrent thrombophlebitis.

f. Varicose veins, if more than mild, or if associated with edema, skin ulceration, or residual scars from ulceration.

2-20. Miscellaneous

The causes for rejection for appointment, enlistment, and inducation are--

a. Aneurysm of the heart or major

vessel, congenital or acquired.

b. History and evidence of a congenital abnormality which has been treated by surgery but with residual abnormalities or complications, for example: Patent ductus arteriosus with residual cardiac enlargement or pulmonary hypertension; resection of a coarctation of the aorta without a graft when there are other cardiac abnormalities or complications; closure of a secundum type artrial septal defect when there are residual abnormalities or complications.

c. Major congenital abnormalities and defects by the heart and vessels unless satisfactorily corrected without residuals or complications. Uncomplicated dextrocardia and other minor asymptomatic anomalies are acceptable.

d. Substantial history of rheumatic fever or chorea within the previous 2 years, recurrent attacks of rheumatic fever or chorea at any time, or with evidence of residual cardiac damage.

Section XII. HEIGHT, WEIGHT, AND BODY BUILD

2-21. Height

The causes for rejection for appoint-

ment, enlistment, and induction are--

a. For appointment.

(1) Men. Regular Army-Height below 66 inches ~~or over 80 inches. (See administrative criteria in para 7-13.) Other--Height below 69 inches or over 80 inches.~~ 69

(2) Women. Height below 58 inches or over 72 inches.

~~b. For enlistments and induction.~~

~~(1) Men.--Height below 60 inches or over 80 inches for Army and Air Force.~~

~~(2) Men.--Height below 60 inches and over 78 inches for Navy and Marine Corps.~~

~~(3) Women.--Height below 58 inches or over 72 inches.~~

2-22. Weight

The causes for rejection for appointment, enlistment, and induction are--

a. Weight related to height which is below the minimum shown in table I, appendix III for men and table II, appendix III for women.

b. Weight related to age and height which is in excess of the maximum shown in table I, appendix III for men and table II, appendix III for women. ~~See chapter 7 for special requirements pertaining to~~

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~~to maximum weight standards applicable to women--enlisting for and commissioned from Army Student Nurse and Army Student Dietician Programs.~~

2-23. Body Build

The causes for rejection for appointment, enlistment, and induction are--

a. Congenital malformation of bones and joints. (See para 2-9, 2-10, and 2-11.)

b. Deficient muscular development which would interfere with the completion of required training.

c. Evidences of congenital asthenia (slender bones; weak thorax; visceroptosis; severe, chronic constipation; or "drop heart" if marked in degree).

d. Obesity. Even though the individual's weight is within the maximum shown in table I or II, as appropriate, appendix III, he will be reported as medically unacceptable when the medical examiner considers that the individual's weight in relation to the bony structure and musculature, constitutes obesity of such a degree as to interfere with the satisfactory completion of prescribed training.

Section XIII. LUNGS AND CHEST WALL

2-24. General

The following conditions are causes for rejection for appointment, enlistment ~~and induction~~ until further study indicates recovery without disqualifying sequelae:

a. Abnormal clovation of the diaphragm on either side.

b. Acute abscess of the lung.

c. Acute bronchitis until the condition is cured.

d. Acute fibrinous pleurisy, associated with acute nontuberculous pulmonary infection.

e. Acute mycotic disease of the lung such as coccidioidomycosis and histophasmosis.

f. Acute nontuberculous pneumonia.

g. Foreign body in trachea or bronchus.

h. Foreign body of the chest wall causing symptoms.

i. Lobectomy, history of, for a nontuberculous nonmalignant lesion with residual pulmonary disease. Removal of more than one lobe is cause for rejection regardless of the absence of residuals.

j. Other traumatic lesions of the chest or its contents.

*k. Pneumothorax or history thereof

within 1 year of date of examination if due to simple trauma or surgery; within 3 years of date of examination if of spontaneous origin. Surgical correction is acceptable if no significant residual disease or deformity remains and pulmonary function tests are within normal limits.

l. Recent fracture of ribs, sternum, clavicle, or scapula.

m. Significant abnormal findings on physical examination of the chest.

2-25. Tuberculous Lesions

(See para 2-38.)

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Active tuberculosis in any form or location.

b. Pulmonary tuberculosis, active within previous 2 years.

c. Substantiated history of one or more reactivations or relapses of pulmonary tuberculosis, or other definite evidence of poor host resistance to the tubercule bacillus.

2-26. Nontuberculous Lesions

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Acute mastitis, chronic cystic mastitis, if more than mild.

b. Bronchial asthma, except for childhood asthma with a trustworthy history of freedom from symptoms since the 12th birthday.

c. Bronchitis, chronic with evidence of pulmonary function disturbance.

d. Bronchicctasis.

e. Bronchopleural fistula.

f. Bullous or generalized pulmonary emphysema.

g. Chronic abscess of lung.

h. Chronic fibrous pleuritis of sufficient extent to interfere with pulmonary function or obscure the lung field in the roentgenogram.

i. Chronic mycotic diseases of the lung including coccidioidomycosis; residual cavitation or more than a few small sized inactive and stable residual modules demonstrated to be due to mycotic disease.

j. Empyema, residual sacculation or unhealed sinuses of chest wall following operation for empyema.

k. Extensive pulmonary fibrosis from any cause, producing dyspnea on exertion.

l. Foreign body of the lung or mediastinum causing symptoms or active inflammatory reaction.

m. Multiple cystic disease of the lung or solitary cyst which is large and incapacitating.

n. New growth of breast; history of mastectomy.

o. Osteomyclitis of rib, sternum, clavicle, scapula, or vertebra.

p. Pleurisy with effusion of unknown origin within the previous 2 years.

q. Sarcoidosis. See paragraph 2-38.

r. Suppurative periostitis of rib, sternum, clavicle, scapula, or vertebra.

Section XIV. MOUTH, NOSE, PHARYNX, TRACHEA, ESOPHAGUS, AND LARNYX

2-27. Mouth

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Hard palate, perforation of.

b. Harelip, unless satisfactorily repaired by surgery.

c. Leukoplakia, if severe.

d. Lips, unsightly mutilations of, from wounds, burns, or disease.

e. Ranula, if extensive. For other tumors see paragraphs 2-10 and 2-41.

2-28. Nose

The causes for rejection for appointment, enlistment, and induction are--

a. Allergic manifestations.

(1) Chronic atrophic rhinitis.

(2) Hay fever if severe; and if not controllable by antihistamines or by desensitization, or both.

b. Choana, atresia, or stenosis of, if symptomatic.

c. Nasal septum, perforation of:

(1) Associated with interference of function, ulceration of crusting, and when the result of organic disease.

(2) If progressive.

(3) If respiration is accompanied by a whistling sound.

d. Sinusitis, acute.

e. Sinusitis, chronic, when more than mild:

(1) Evidenced by any of the following: Chronic purulent nasal discharge, large nasal polyps, hyperplastic changes of the nasal tissues, or symptoms requiring frequent medical attention.

(2) Confirmed by transillumination or X-ray examination or both.

2-29. Pharynx, Trachea, Esophagus, and

Larynx

The causes for rejection for appointment, enlistment, ~~and induction~~ are--

a. Esophagus, organic disease of, such as ulceration, varices, achalasia; peptic esophagitis; if confirmed by appropriate X-ray or esophagoscopic examinations.

b. Laryngeal paralysis, sensory or motor, due to any cause.

c. Larynx, organic disease of, such as neoplasm, polyps, granuloma, ulceration, and chronic laryngitis.

d. Plica dysphonia venricularis.

e. Tracheostomy or truchal fistula.

2-30. Other Defects and Diseases

The causes for rejection for appointment, enlistment, ~~and induction~~ are--

a. Aphonia.

b. Deformities or conditions of the mouth, throat, pharynx, larynx, esophagus, and nose which interfere with mastication and swallowing of ordinary food, with speech, or with breathing.

c. Destructive syphilitic disease of the mouth, nose, throat, larynx, or esophagus. (See para 2-42).

d. Pharyngitis and nasopharyngitis

chronic, with positive history and objective evidence, if of such a degree as to result in excessive time lost ~~in the military environment.~~

Section XV. NEUROLOGICAL DISORDERS

2-31. Neurological Disorders

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Degenerative disorders.

(1) Cerebellar and Friedreich's ataxia.

(2) Cerebral arteriosclerosis.

(3) Encephalomyelitis, residuals of, which preclude the satisfactory performance of ~~military~~ duty.

(4) Huntington's chorea.

(5) Multiple sclerosis.

(6) Muscular atrophies and dystrophies of any type.

b. Miscellaneous

(1) Congenital malformations if associated with neurological manifestations and meningoccle even if uncomplicated.

(2) Migraine when frequent and incapacitating.

(3) Paralysis or weakness, deformity, discoordination, pain, sensory

disturbance, intellectual deficit, disturbances of consciousness, or personality abnormalities regardless of cause which is of such a nature or degree as to preclude the satisfactory performance of ~~military~~ duty.

(4) Tremors, spasmodic torticollis, athetosis or other abnormal movements more than mild.

c. Neurosyphilis of any form (general paresis, tabes dorsalis, meningovascular syphilis).

d. Paroxysmal convulsive disorders, disturbances of consciousness, all forms of psychomotor or temporal lobe epilepsy or history thereof except for seizures associated with toxic states or fever during childhood up to the age of 12.

e. Peripheral nerve disorder.

(1) Polyneuritis.

(2) Mononeuritis or neuralgia which is chronic or recurrent and of an intensity that is periodically incapacitating.

(3) Neurofibromatosis.

f. Spontaneous subarachnoid hemorrhage, verified history of, unless cause has been surgically corrected.

Section XVI. PSYCHOSES, PSYCHONEUROSES, AND PERSONALITY DISORDERS

2-32. Psychoses

The causes for rejection for appointment, enlistment, ~~and induction~~ are--

Psychosis or authenticated history of a psychotic illness other than those of a brief duration associated with a toxic or infectious process.

2-33. Psychoneuroses

The causes for rejection for appointment, enlistment, ~~and induction~~ are--

a. History of a psychoneurotic reaction which caused--

(1) Hospitalization.

(2) Prolonged care by a physician.

(3) Loss of time from normal pursuits for repeated periods even if of brief duration, or

(4) Symptoms or behavior of a repeated nature which impaired school or work efficiency.

b. History of a brief psychoneurotic reaction or nervous disturbance within the preceding 12 months which was sufficiently severe to require medical attention or absence from work or school for a brief period (~~maximum~~ minimum of 7 days).

2-34. Personality Disorders

The causes for rejection for appointment, enlistment, ~~and induction~~ are--

a. Character and behavior disorders, as evidenced by--

(1) Frequent encounters with law enforcement agencies, or antisocial attitudes or behavior which, while not a cause for administrative rejection, are tangible evidence of an impaired characterological capacity to adapt to the military service.

(2) Overt homosexuality or other forms of sexual deviant practices such as exhibitionism, transvestism, voyeurism, etc.

(3) Chronic alcoholism or alcohol addiction.

(4) Drug addiction.

b. Character and behavior disorders where it is evident by history and objective examination that the degree of immaturity, instability, personality inadequacy, and dependency will seriously interfere with adjustment in the ~~military~~ service as demonstrated by repeated inability to maintain reasonable adjustment in school, with employers and fellow-workers, and other society groups.

c. Other symptomatic immaturity reactions such as authenticated evidence of enuresis which is habitual or persistent, not due to an organic condition (para 2-15c) occurring beyond early adolescence (age 12 to 14) and stammering or stuttering of such a degree that the individual is normally unable to express himself clearly or to repeat commands.

*d. Specific learning defects secondary to organic or functional mental disorders.

Section XVII. SKIN AND CELLULAR TISSUES

2-35. Skin and Cellular Tissues

The causes for rejection for appointment, enlistment, and induction are--

a. Acne. Severe, when the face is markedly disfigured, or when extensive involvement of the neck, shoulders, chest, or back would be aggravated by or interfere with the wearing of ~~military~~ equipment.

b. Atoxic dermatitis. With active or residual lesions in characteristic areas (face and neck, antecubital and poplitical fossae, occasionally wrists and hands), or documented history thereof.

c. Cysts.

(1) Cysts, other than pilonidel. Of such a size or location as to interfere with the normal wearing of ~~military~~ equipment.

(2) Cysts, pilonidal. Pilonidal cysts, if evidenced by the presence of a tumor mass or a discharging sinus.

d. Dermatitis factitia.

e. Dermatitis herpetiformis.

f. Eczema. Any type which is chronic and resistant to treatment.

f. Elephentiasis or chronic lymphedema.

g. Epidermolysis bullosa; pemphigus.

h. Fungus infections, systemic or superficial types: If extensive and not amenable to treatment.

i. Furunculosis. Extensive, recurment, or chronic.

j. Hyperhidrosis of hands or feet: Chronic or severe.

k. Ichthyosis. Severe.

l. Leprosy. Any type.

m. Leukemia cutis; mycosis fungoides; Hodgkins' disease.

n. Lichen planus.

o. Lupus crythematosus (acute, subacute, or chronic) or any other dermatosis aggravated by sunlight.

p. Neurofibromatosis (Von Recklinghausen's disease).

q. Nevi or vascular tumors: If extensive, unsightly, or exposed to constant irritation.

r. Psoriasis or a verified history thereof.

s. Radiodermatitis.

t. Scars which are so extensive, deep, or adherent that they may interfere with the wearing of ~~military~~ equipment, or that show a tendency to ulcerate.

u. Scleroderma. Diffuse type.

v. Tuberculosis. See paragraph 2-38.

w. Urticaria. Chronic.

x. Warts, plantar, which have materially interfered with the following of a useful vocation in civilian life.

y. Xanthoma. If disabling or accompanied by hypercholesterolemia or hyperlipemia.

z. Any other chronic skin disorder of a degree or nature which requires frequent outpatient treatment or hospitalization, interferes with the satisfactory performance of duty, or is so disfiguring as to make the individual objectionable in ordinary social relationships.

*aa. Tattoos on any part of the body which in the opinion of the examining physician are obscene or so extensive on exposed areas as to be considered unsightly, are administratively disqualified.

Section XVIII. SPINE, SCAPULAE, RIBS, AND SACROILIAC JOINTS

2-36. Spine and Sacroiliac Joints

(See also para 2-11.)

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Arthritis. See paragraph 2-11a.

b. Complaint of disease or injury of the spine or sacroiliac joints either with or without objective signs and symptoms which have prevented the individual from successfully following a physically active vocation in civilian life. Substantiation or documentation of the complaint without symptoms and objective signs is required.

c. Deviation or curvature of spine from normal alignment, structure, or function (scoliosis, kyphosis, or lordosis, spina bifida acculta, spondylolysis, etc.), if--

(1) Mobility and weight-bearing power is poor.

(2) More than moderate restriction of normal physical activities is required.

(3) Of such a nature as to prevent the individual from following a physically active vocation in civilian life.

(4) Of a degree which will interfere with the wearing of a uniform or ~~military~~ equipment.

(5) Symptomatic, associated with positive physical finding(s) demonstrable by X-ray.

d. Diseases of the lumbosacral or sacroiliac joints of a chronic type and obviously associated with pain referred to the lower extremities, muscular spasm, postural deformities and limitation of motion in the lumbar region of the spine.

e. Granulomatous diseases either active or healed.

f. Healed fracture of the spine or pelvic bones with associated symptoms which have prevented the individual from following a physically active vocation in civilian life or which preclude the satisfactory performance of military duty.

g. Ruptured nucleus pulposus (herniation of intervertebral disk) or history of operation for this condition.

h. Spondylolysis or spondylolisthesis that is symptomatic or is likely to interfere with performance of duty or is likely to require assignment limitations.

2-37. Scapulae, Clavicles, and Ribs

(See para 2-11.)

The causes for rejection for appointment, enlistment, and induction are--

a. Fractures until well-healed, and until determined that the residuals thereof will not preclude the satisfactory performance of ~~military~~ duty.

b. Injury within the preceding 6 weeks, without fracture, or dislocation, of more than a minor nature.

c. Osteomyelitis of rib, sternum, clavicle, scapula or vertebra.

d. Prominent scapulae interfering with function or with the wearing of unfiorm or ~~military~~ equipment.

Section XIX. SYSTEMIC DISEASES AND MISCELLANEOUS CONDITIONS AND DEFECTS

2-38. Systemic Diseases

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Dermatomyositis.

b. Lupus erythemalosus: acute, subacute, or chronic.

c. Progressive systemic sclerosis.

d. Reiter's Disease.

e. Sarcoidosis.

f. Scleroderma, diffuse type.

g. Tuberculosis:

(1) Active tuberculosis in any form or location or substantiated history of active tuberculosis within the previous 2 years.

(2) Substantiated history of one or more reactivations or relapses of tuberculosis in any form or location or other definite evidence of poor host resistance to the tubercle bacillus.

(3) Residual physical or mental defects from past tuberculosis that would preclude the satisfactory performance of duty.

(4) (Deleted).

2-39. General and Miscellaneous Conditions and Defects

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Allergic manifestations.

(1) Allergic rhinitis (hay fever). See paragraph 2-28.

(2) Asthma. See paragraph 2-26b.

(3) Allergic dermatoses. See

paragraph 2-35.

(4) Visceral, abdominal, and cerebral allergy, if severe or not responsive to treatment.

(5) Bona fide history of moderate or severe generalized (as opposed to local) allergic reaction to insect bites or stings. Bona fide history of severe generalized reaction to common foods, e.g., milk, eggs, beef, and pork.

b. Any acute pathological condition, including acute communicable diseases, until recovery has occurred without sequelae.

c. Any deformity which is markedly unsightly or which impairs general functional ability to such an extent as to prevent satisfactory performance of ~~military~~ duty.

d. Chronic metallic poisoning especially beryllium, manganese, and mercury. Undesirable residuals from lead, arsenic, or silver poisoning make the examinee medically unacceptable.

e. Cold injury, residuals of, (example frostbite, chilblain, immersion foot, or trench foot) such as deep seated ache, paresthesia, hyperhidrosia, easily trauma-

tized skin, cyanosis, amputation of any digit, or ankylosis.

f. Positive tests for syphilis with negative TPI test unless there is a documented history of adequately-treated lues or any of the several conditions which are known to give a false-positive S.T.S. (vaccinia, infectious hepatitis, immunizations, atypical pneumonia, etc.) or unless there has been a reversal to a negative S.T.S. during an appropriate follow-up period (3 to 6 months).

g. Filariasia; trypanosomiasis; amebiasis; schistosomiasis; uncinariasis (hookworm) associated with anemia, malnutrition, etc., if more than mild, and other similar worm or animal parasitic infestations, including the carrier states thereof.

h. Heat pyroxia (heatstroke, sunstroke, etc.): Documented evidence of predisposition (includes disorders of sweat mechanism and previous serious episode), recurrent episodes requiring medical attention, or residual injury resulting therefrom (especially cardiac, cerebral, hepatic, and renal).

i. Industrial solvent and other chemi-

cal intoxication, chronic including carbon bisulfide, tricholorethylene, carbon tetrachloride, and methyl cellosolve.

j. Mycotic infection of internal organs.

k. Myostis or fibrositis; severe, chronic.

l. Residuals of tropical fevers and various parasitic or protozoal infestations which in the opinion of the medical examiner preclude the satisfactory performance of ~~military~~ duty.

Section XX. TUMORS AND MALIGNANT DISEASES

2-40. Benign Tumors

The causes for rejection for appointment, enlistment, and induction are--

a. Any tumor of the--

(1) Auditory canal, if obstructive.

(2) Eye or orbit (see also para 2-2a(6)).

(3) Kidney, bladder, testicle, or penis.

(4) Central nervous system and its membraneous coverings unless 5 years after surgery and no otherwise disqualifying residuals of surgery or of original lesion.

b. Benign tumors of the abdominal

wall if sufficiently large to interfere with ~~military~~ duty.

c. Benign tumors of bone likely to continue to enlarge, be subjected to trauma during military service, or show malignant potential.

*d. Benign tumors of the thyroid or other structures of the neck, including enlarged lymph nodes, if the enlargement is of such degree as to interfere with the wearing of a uniform or military equipment.

e. Tongue, benign tumor of, if it interferes with function.

f. Breast, thoracic contents, or chest wall, tumors, of, other than fibromata lipomata, and inclusion or sebaceous cysts which do not interfere with military duty.

g. For tumors of the internal or external female genitalia see paragraph 2-14h.

2-41. Malignant Diseases and Tumors

The causes for rejection for appointment, enlistment, ~~and induction are~~--

a. Leukemia, acute or chronic.

b. Malignant lymphomata.

c. Malignant tumor of any kind, at

any time, substantiated diagnosis of, even though surgically removed, confirmed by accepted laboratory procedures, except as noted in paragraph 2-12a(6).

Section XXI. VENEREAL DISEASES

2-42. Venereal Diseases

In general the finding of acute, uncomplicated venereal disease which can be expected to respond to treatment is not a cause for medical rejection for ~~military~~ service. The causes for rejection for appointment, enlistment, and induction are--

a. Chronic venereal disease which has not satisfactorily responded to treatment. The finding of a positive serologic test for syphilis following the adequate treatment of syphilis is not in itself considered evidence of chronic venereal disease which has not responded to treatment (para 2-39f).

b. Complications and permanent residuals of venereal disease if progressive, of such nature as to interfere with the satisfactory performance of duty, or if subject to aggravation by ~~military~~ service.

c. Neurosyphilis. See paragraph 2-31c.

*Section XXII. VOCATIONAL WAIVERS

2-43. Vocational Waivers

When an individual who fails to meet the medical standards listed in this chapter has demonstrated in the pursuit of his civilian occupation, profession, or avocation that he is likely to be able satisfactorily to perform the duties of a member of the ~~Armed Forces~~ State Police, the medical examiner may recommend to the Surgeon General ~~of the appropriate service~~ that such an individual be accepted on waivers of medical fitness standards. Such cases shall be considered by the Surgeon General before a final decision is made.

[THE OPINION OF THE DISTRICT COURT DATED MAY 31, 1974 IS PRINTED IN A SEPARATE APPENDIX TO THE JURISDICTIONAL STATEMENT AT PAGES 11-18.]

[THE OPINION OF THE DISTRICT COURT DATED DECEMBER 12, 1974 IS PRINTED IN A SEPARATE APPENDIX TO THE JURISDICTIONAL STATEMENT AT PAGES 19-23.]

[THE ORDER OF THE DISTRICT COURT DATE DECEMBER 12, 1974 IS PRINTED IN A SEPARATE APPENDIX TO THE JURISDICTIONAL STATEMENT AT PAGE 24.]

[TITLE OMITTED IN PRINTING.]

NOTICE OF APPEAL

Notice is hereby given that the Members and Executive Secretary of the Commonwealth of Massachusetts Board of Retirement and the Commissioner of Public Safety of the Commonwealth of Massachusetts, Defendants in the above-entitled action, hereby appeal to the Supreme Court of the United States from the Order enjoining the Defendants from further enforcement of Mass. G.L. c. 32, § 26(3) entered by a three-judge court in this action on the 12th day of December, 1974.

By their attorney,

/s/

Terence P. O'Malley
Assistant Attorney
General

December 23, 1974

[CERTIFICATE OF SERVICE OMITTED IN PRINTING.]

Supreme Court, U. S.
FILED
MAR 21 1975
MICHAEL RODAK, JR., CLERK

In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT;
ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT;
JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT;
and JOHN F. KEHOE, JR., COMMISSIONER of PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS,
APPELLANTS,

v.

ROBERT D. MURGIA,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION OF APPELLEE TO AFFIRM

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In the
Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT;
ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT;
JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT;
and JOHN F. KEHOE, JR., COMMISSIONER of PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS,
APPELLANTS,

v.

ROBERT D. MURGIA,
APPELLEE.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION OF APPELLEE TO AFFIRM

Pursuant to Rule 16 of the Rules of the Supreme Court of the United States, Appellee Robert D. Murgia moves

this Court to affirm the decision of the United States District Court for the District of Massachusetts on the ground that the question presented is so insubstantial as not to need further argument.

Statement of the Case

The Uniformed Branch of the Massachusetts State Police is organized under the laws of the Commonwealth of Massachusetts for the primary purpose of providing protection for persons and property and for the maintenance of law and order in the Commonwealth. At present the Uniformed Branch consists of approximately 880 members organized in a paramilitary structure. Its personnel are assigned primarily to field operations.

Men between the ages of 21 and 30 may apply for initial enlistment in the Uniformed Branch. An applicant's suitability for membership in the Uniformed Branch is determined in part by an enlistment physical examination. The enlistment physical examination is a comprehensive and thorough examination based upon the medical examination used at basic training in the Military. Failure to pass the physical examination results in the applicant being refused membership. The enlistment term is set administratively at two years.

After completing the initial two year enlistment term, a member must apply for reenlistment for each additional two year term he serves. Acceptance for each subsequent enlistment is conditioned upon successful completion of the reenlistment examination, which is identical to the enlistment physical examination. Failure to pass the examination results in denial of the reenlistment application unless a waiver is obtained.

Beginning at age 40 the member must undergo a medical examination on an annual basis. The annual examination

given to members over age 40 is identical to the enlistment and reenlistment physical examination and in addition requires an electrocardiogram and a test for intestinal bleeding. Failure to pass the annual physical examination results in mandatory disability retirement unless a waiver is obtained. When a member passes the enlistment, reenlistment and annual physical, he is administratively determined to be completely fit and qualified to perform all of the duties of the Uniformed Branch of the Massachusetts State Police.

Every member of the Uniformed Branch of the Massachusetts State Police who has served a minimum of 20 years is mandatorily retired for superannuation at age 50. Those members who have not served for 20 years on their fiftieth birthday are permitted to continue in service until completion of 20 years, provided the member continues to pass the annual physical examination.

Plaintiff was born on July 23, 1922 and on April 7, 1948 became a member of the Uniformed Branch of the Massachusetts State Police, attaining the rank of Lieutenant Colonel, the highest rank in the Uniformed Branch and the second ranking officer in the Massachusetts State Police. In March, 1972 the plaintiff was given his annual physical examination and was found fully qualified to continue in his duties as a uniformed state police officer. On May 8, 1972 plaintiff received a letter from the Retirement Board of the Commonwealth of Massachusetts informing him that under the provisions of Massachusetts General Laws ch. 32, §26(3), he was subject to mandatory retirement for superannuation on his fiftieth birthday, which would occur on July 23, 1972. Thereafter on July 7, 1972 plaintiff commenced this civil action in the United States District Court for the District of Massachusetts alleging denial of his civil rights of due process and equal protection

and seeking an injunction against the operation of Mass. Gen. Laws ch. 32, §26(3) (1966).

After hearing on a motion for a temporary restraining order and a request for the convening of a three-judge court, the district judge dismissed the complaint for failure to raise a substantial constitutional question. The plaintiff was mandatorily retired from the Massachusetts State Police on July 23, 1972. The plaintiff appealed the decision of the single judge to the United States Court of Appeals for the First Circuit, which court reversed the judgment of the district court and remanded the matter to the district court for the convening of a three-judge court pursuant to 28 U.S.C. §§ 2281 and 2284 (1970).

A three-judge court was convened and evidence was taken by way of the submission of depositions, affidavits and various documentary materials. The court reached only the issue of whether the statutory classification based on age 50 had a rational basis in furthering some substantial state interest. The court found that the plaintiff had standing to raise the issue in that he was in excellent physical health and capable of performing the duties of a state police officer whether involving physical or psychological stress. The court found that service in the Uniformed Branch is or can be arduous and that the state has a legitimate purpose in maintaining rigorous job requirements. The court placed the burden on the plaintiff to show that the statute lacked a rational basis.

The court held that the plaintiff showed he had a recognizable interest in retaining his employment which the state could not deny arbitrarily or irrationally and that he had met his burden in showing that the mandatory retirement of officers at age 50 had no fair and substantial relationship to the object of the legislation.

After a further hearing on the nature of the relief to be granted, the court entered an order enjoining the de-

fendants, the Board of Retirement and the Commissioner of Public Safety, from enforcing Mass. Gen. Laws ch. 32, § 26(3) against the plaintiff. Defendants have appealed the decision of the district court.

Argument

The three-judge district court found that Mass. Gen. Laws ch. 32, § 26(3) which required the members of the Uniformed Branch of the Massachusetts State Police to be mandatorily retired because of superannuation at age fifty violated plaintiff's constitutional rights of equal protection and due process of law and declared the statute unconstitutional and void. *Murgia* v. *Commonwealth of Massachusetts Board of Retirement*, 376 F. Supp. 753, 756 (D. Mass. 1974).

Appellants urge that a review of the holding of the district court requires plenary consideration by this Court because that holding allegedly ignored essential governmental interests and generates uncertainty in the administration of the state police and its retirement system.[1] Appellants allege that the district court's holding that plaintiff established the absence of any rational basis for the statute is in error.

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[1] Much of the alleged uncertainty in the administration of the state police and its retirement system will be rectified with the passage of House Bill 2167 which is presently pending in the Massachusetts General Court. The bill would strike that part of the statute which the district court declared unconstitutional and substitute therefor the following language:

> Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty-five or upon the expiration of such twenty years, whichever last occurs.

For text of House Bill 2167, see Appendix A.

Appellants do not dispute the district court's holding that plaintiff had standing to raise the issue. Nor do appellants challenge the propriety of the court's determination that the correct standard to be applied to test the constitutionality of the challenged state statute is that it bear a rational relation to furthering some substantial state interest. Appellants admit that the lower court correctly determined that the statute could not withstand plaintiff's challenge if it did not bear a " 'fair and substantial relation to the object of the legislation,' F. S. Royster Guano Co. v. Virginia, 1920, 253 U.S. 412, 415 quoted in Reed v. Reed, 1971, 404 U.S. 71, 76." 376 F. Supp. at 754.

The issue which Appellants take with the district court's opinion concerns only what they consider to be the court's improper application of this standard. Thus, Appellants contend:

> The district court purported to apply the rational basis test in ascertaining whether the retirement statute violated the Equal Protection Clause. Had the court actually adhered to that test, the statute would surely have survived the constitutional challenge. Jurisdictional Statement for Appellant at 5-6.

An examination of the district court's opinion shows that the test of the constitutionality of the statute was correct as applied and Appellants' contentions to the contrary are unsupportable.

The point of departure for the district court in its analysis of whether the statute bore a rational basis to a substantial state interest was the determination of the state interests involved. The district court recognized and fully respected the interests of the state in having the

Uniformed Branch provide protection for persons and property and maintain law and order. The court also recognized the fact that in order to accomplish this object the personnel must be vigorous and healthy. Unquestionably this is a legitimate state object. The district court said:

> [I]t is acknowledged that service in this branch is, or can be, arduous, and that high versatility is required, with few, if any, backwaters available for the partially superannuated. Lest there be misunderstanding, we do not fault the service in this respect; the state is entitled to maintain rigorous job requirements; nor do we understand plaintiff to contend otherwise. 376 F. Supp. at 754.

It does not appear that the Appellants challenge the correctness of this statement of the state interests. Rather, Appellants' contention appears to be that, although the district court recognized and purported to respect the legitimate governmental interests in maintaining a vigorous force; in reaching its decision that the mandatory retirement statute was unconstitutional, the court in fact must have ignored or overlooked these intrests. Appellants assert that, had the district court respected the legitimate state interest in maintaining a vigorous force it could not have found as it did; because, as they contend, mandatory retirement is inescapably related to promoting the physical capability of the state police to perform its arduous police functions. Juris. Statement for Appellant at 6.

A state may have legitimate purposes or objectives in enacting a statute and the statute can still be found defective, not because the objectives are illegitimate but

because the means to achieve the objective are not constitutionally defensible. *Vlandis* v. *Kline,* 412 U.S. 441, 452-53 (1973); *Stanley* v. *Illinois,* 405 U.S. 645, 652 (1972); *Reed* v. *Reed,* 404 U.S. 71, 76 (1971). *See also Bell* v. *Burson,* 402 U.S. 535 (1971); *Carrington* v. *Rush,* 380 U.S. 89 (1965). It may even be that upon examination it is found that the means adopted by the statute to achieve its legitimate objectives have the effect of frustrating those very objectives. *See Vlandis* v. *Kline, supra,* at 450 (1973); *Stanley* v. *Illinois, supra,* at 654-55. That is precisely what the district court found to be the fact in this case. The mandatory retirement statute may have as its objective the promotion of the physical capability of the state police but in its operation the statute does not bear any relationship to that object and may even frustrate it.

In proceeding with its analysis, the district court discussed the restrictive judicial review to be accorded a legislative determination establishing an eligibility standard when there existed no factual basis upon which to make a precise determination. The court said the proper legislative response in many such situations is that ". . . it is administratively reasonable to select an arbitrary cutoff, and that irrationality is not established by the fact that certain individuals are disadvantaged thereby." 376 F. Supp. at 755. The district court recognized the numerous instances where legislative line drawing cannot be made with absolute precision. It said:

> We fully accept the necessity of choosing arbitrary standards in certain, and indeed in many, situations. For example, in dealing with the immeasurable changes relating to the onset of maturity, legislatures may require a specific age for voting, *Oregon* v. *Mitchell,* 1970, 400 U.S. 112, even though the particular age selected may seem indifferentiable from other ages in proximity to it. *Id.* at 294 (Stewart, J., concurring in part and dissenting in part); *see id.* at 243-46 (Brennan, White and Marshall, JJ., concurring in part and dissenting in part). *See also, e.g., United States* v. *Duncan,* 9 Cir. 1972, 456 F.2d 1401, 1405 (minimum age for jury service), *vacated on other grounds,* 409 U.S. 814; *Smith* v. *United States,* 9 Cir. 1970, 424 F.2d 267 (selective service age limitations); *Scarangella* v. *Commissioner,* 3 Cir. 1969, 418 F.2d 228 (classification of tax exemptions by age of dependent). *Id.*

The district court noted and the plaintiff concedes that irrationality is not established by the mere fact that certain individuals, such as plaintiff, may be disadvantaged by a legislative classification. To suggest, however, as Appellants do, that the issue in this case pertains to the fact that plaintiff individually may have maintained a high level of physical capability misconceives the issue before the district court and misconstrues its holding.

The Appellants have argued that since there is admittedly a general relationship between advancing age and decreasing physical ability to do the job, and since the precise point at which the two meet will vary from case to case, the legislature should have unfettered power to arbitrarily determine the point at which the two intersect. That legislative line drawing may be necessarily arbitrary in an individual case, does not mean that the legislature has a free hand in drawing the line wherever it pleases. The line must still bear some rational relationship to the objects of the statute. *Stanley* v. *Illinois, supra,* at 652; *Glona* v. *American Guarantee & Liability Insurance Co.,* 391 U.S. 73, 75-76 (1968). As the district court put it:

> But to say that a line may be drawn arbitrarily when there is no readily discernible breaking, or turning, point, does not mean that the line can be drawn anywhere at all. To satisfy minimal standards of rationality the line must be drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is preferable to any other. 376 F. Supp. at 755.

The operation of the statute affected not just one individual but every member of the Uniformed Branch by erecting a conclusive presumption that a member who at age 50 had 20 years of service was incapable of performing the duties of the Uniformed Branch. The court held that the retirement statute, by setting the age for mandatory retirement at so did not come within the "range where fairness, or some appreciable state interest, exists . . . ." *Id.*

Of the facts upon which the court particularly relied were those which pertained to the extensive medical testing to which each member of the Uniformed Branch of the Massachusetts State Police is subjected from the time he makes his application to join the force until he is retired. This fact of individualized medical testing provides a source of data as to the duration in time of the physical capability of the membership which cannot be ignored in the legislative establishment of the mandatory retirement age. The court said:

> In the voting and other cases above cited, the legislature was concerned with a broad spectrum of the population where it would not be practicable to make individual determinations. Under such circumstances an arbitrary standard is called for, if not inevitable,

> and the only question must be whether the one selected is, in the large, reasonable. In the case at bar the situation is exactly the reverse. Individual testing is not impracticable but, rather, is already the order of the day. *Id.*

The Appellants in their Jurisdictional Statement allege that the district court's reliance on the medical testing to demonstrate physical capability is misplaced because the testing has a singular and extremely limited purpose of assisting in the determination of whether or not a member should be retired for disability. Thus the Appellants say "[t]he medical examinations are designed to determine whether a state police officer has a physical defect which would warrant his retirement for disability. This determination relates to the maintenance of a minimal level of capability . . . ." Juris. Statement for Appellant at 7.

The facts to which Appellants stipulated and agreed at trial and to which its witnesses testified differ sharply from the restricted definition suggested in the Jurisdictional Statement. These medical examinations are, in the words of the Surgeon General and chief medical officer of the state police, the "same as those for an individual who is to undergo basic training at a military installation . . . most of those pages [in the state police manual of medical fitness standards] are taken directly out of an Army regulation . . . ." Deposition of Colonel Paul John Murphy at 15.

The purpose of the medical testing is not solely limited to a determination as to retirement for disability since the same examination is used to determine initial eligibility for men joining the Uniformed Branch. The same examination is also used to determine members' fitness

for reenlistment. Failure to meet the standards of the enlistment, reenlistment and annual examination in any respect disqualifies a member for service, unless the member obtains a waiver from the Commissioner of Public Safety. Successful completion of the medical examination, whether it is the enlistment, reenlistment or annual examination is a determination by the state that the member ". . . is found to be qualified to perform all of the duties of the Uniformed Branch of the Massachusetts State Police." Plaintiff's Statement of Facts, No. 55; Defendants Admission No. 55.

The district court found that the net effect of this comprehensive medical testing program is to carefully screen and rescreen the membership to eliminate individuals who lack the requisite physical capability to perform the duties of the state police. Unfit persons are denied enlistment and reenlistment or are retired for disability. The medical testing program causes the Uniformed Branch to retain only those members who are found fit to perform all of the duties of the Massachusetts State Police. The result is that, by the time a member reaches his 49th year he has been annually examined for the preceding decade and administratively determined to be physically fit to perform all of the duties of the Uniformed Branch. Then, on his fiftieth birthday although fully fit under the state's comprehensive determination, he is forced to retire because of the operation of a statutory irrebuttable presumption that he is unfit to perform his duties.

The undisputed facts thus forced the conclusion that the mandatory retirement age not only had no rational relation to the statutory purpose of insuring the physical capability of the force but also had the counterproductive effect of forcing the retirement of members who had been determined by the state under its own definition to be fit and fully qualified.

The court correctly determined that the operation of the mandatory retirement provision in the Massachusetts statute is similar to the operation of the mandatory leave provisions struck down by this Court in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). In that case mandatory fifth and sixth month leave dates were attempted to be justified, among other reasons, on the ground that they kept physically unfit teachers out of the school room. This Court acknowledged the legitimacy of the objective but found the rule swept too broadly because of its conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing.[2] The Court found the rules defective because:

> [they] contain an irrebuttable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary. 414 U.S. at 644.

However, in determining that no rational relationship existed between the mandatory retirement age and the statutory purpose of maintaining a vigorous force, the three-judge court did not rest its analysis entirely on this point. The court suggested a rational basis might lie in

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[2] Although the subject matter before the Court in *LaFleur* pertained to the fundamental constitutional right of procreation, the Court has indicated its disfavor with conclusive presumptions in cases which did not involve fundamental rights. *See Vlandis* v. *Kline*, 412 U.S. 441, 446 (1973); *Bell* v. *Burson*, 402 U.S. 535 (1971); *Carrington* v. *Rush*, 380 U.S. 89 (1965). *See United States Dept. of Agriculture* v. *Murray*, 413 U.S. 503, 514-17 (1973) (concurring opinion); *Heiner* v. *Donnon*, 285 U.S. 312 (1932); *Hoeper* v. *Tax Comm'n*, 284 U.S. 206 (1931); *Schlesinger* v. *Wisconsin*, 270 U.S. 230 (1926). If anything the statute here is on even less firm ground because there already exists individualized testing and the results show that each member mandatorily retired had been found to be fit within 12 months or less of his forced retirement.

the possibility that beginning at age 50 the aging process becomes more unpredictable so that the prognostic value of the medical testing is reduced and no longer provides an accurate indicator of the member's fitness for continued service. *See Airlines Pilots Ass'n, Int'l* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1961). If this were the case, the court reasoned, then the state would be justified in disregarding the test data it had before it and might be justified in adhering to its arbitrary determination of age 50 for mandatory retirement.[3] The evidence showed that there was no significant change in the reliability of medical testing beginning at age 50 and the court found that "no such determination has been or could be made in the case at bar." 376 F. Supp. at 755-56.

In reaching its determination that no "critical area" was reached, the court relied upon the testimony of the experts from both sides and the statistics furnished by the Appellants. The experts had testified that there was no significant change in the reliability of medical testing at age fifty in a group which had individually passed annual tests during the preceding decade. The statistics reflecting the state experience, which plaintiff put in evidence, furnished "no reason to suppose that age 50 is within, or even significantly approaching, a range where

[3] The Appellants have suggested that the court improperly relieved the plaintiff of its burden of proof and shifted the burden to defendants to show that a critical area had been reached in that testing was not validly predictive of continued fitness. The Appellants state "if the issue is whether a critical area is reached at age fifty, the plaintiff must prove that such an area is not reached." Juris. Statement for Appellant at 8. The plaintiff in fact did show this. The Court made certain that the burden of proof remained on the plaintiff throughout. At the outset of the opinion the court said "the burden is on the plaintiff to show a lack of rational basis" and at the end of the opinion the court concluded that the "plaintiff has established the absence of any factual basis" for the statute. 376 F. Supp. at 754, 756.

changes of conditions warrant a change of treatment. Rather, they contradict it." *Id.* at 756. In addition the court found that the national experience as shown in the retirement statutes for other state police forces supported plaintiff's position.[4]

Appellants suggest that there exist state interests independent of the objectives of maintaining the physical capacity of the force which must be protected. These are the state interests in promoting morale and incentive in the service. Juris. Statement for Appellant at 9. Although these interests fall outside the stated legislative purpose of the statute, the district court nevertheless considered them.

The Appellants suggested that the age 50 mandatory retirement has the effect of providing a shorter average term of service than would be the case if a later age were selected. It follows, they argue, that the shorter the term of service the more promotions become available and morale is therefore enhanced. *Id.* The district court said that it would concede the validity of the morale argument if officers not capable of carrying their full load

[4] The Appellants' own experience with members serving on full duty status in the Uniformed Branch after age 50 contradicts their assertion that such men are not fit. Under an exception to the mandatory retirement statute, men who have not served a minimum of 20 years in the Uniformed Branch upon reaching their fiftieth birthday are permitted to continue to serve until they have 20 years of service, provided they continue to pass the annual physical examination. Although the occurrence is rare because most men have at least 20 years of service by the time they reach age fifty, a number of members have continued to serve in full capacity in the Uniformed Branch well into their fifties. The court also had before it evidence as to the airline pilot retirement age of 60. *See* 29 C.F.R. § 860.102(d) (1973); Armed Service mandatory retirement for commissioned officers begins at age 60, 10 U.S.C. § 3883 *et seq.*; members of the Federal Bureau of Investigation must retire at age 55 or upon completion of 20 years of service if then over that age. 5 U.S.C. § 8335(g) (Supp. 1975); retirement ages for members of the police departments of the cities and towns of the Commonwealth of Massachusetts, age 65, Mass. Gen. Laws ch. 32, § 83A(d) (1966).

were to be retained but since that would not occur it did not accept this argument. The court said of the Appellants' contention:

> Its argument that early retirement enhances the morale of the younger members, in a sense assumes the point. Of course, if there are only younger members, they are happier than the older members who are being eliminated. This does not add up on balance, but merely advances the time of ultimate unhappiness. The same can be said with respect to the alleged desirability of rapid promotion; the attractiveness of quick promotion must be weighed against the unattractiveness of early retirement. Furthermore, to the extent that the purpose of early retirement is said to be to empty higher ranking positions after they have been occupied by one person for a reasonable time, the cut-off at 50 years is of questionable consequence since it is unrelated to the period of time the retiree has occupied his last position. 376 F. Supp. at 754-55.

Appellants argue that the district court did not properly consider the state's legitimate interest in preventing the stagnation of promotion of younger officers discussed by this Court in *Schlesinger* v. *Ballard,* 43 U.S.L.W. 4158 (U.S. Jan. 15, 1975). The district court noted that under Massachusetts law a state police officer is never required to seek promotion or to accept promotion. 376 F. Supp. at 755 n.6. An officer may remain in his rank and grade for his entire career regardless of the fact that the promotion of other members in the pyramidal organizational structure thus may be retarded. Therefore the mandatory retirement statute which is the subject of this case is entirely different from one which was based upon the

"basic up or out philosophy" of the statute which was under review in *Schlesinger* v. *Ballard, supra.*[5]

Finally, the Appellants argue that the opinion of the district court below not only lacked case support but indeed disregarded substantial case law to the contrary. Juris. Statement for Appellant at 10.

Appellee submits that none of the cases cited by the Appellants detract from the correctness of the holding of the district court. That holding rests upon the proper analysis of the legislative line drawing function as a variable depending upon the persons to be included and the amount of data which the legislature has before it or could have before it. The court's review of the legislative line drawing function in cases like this one is restricted to a determination of whether the line falls within the range of fairness or rational relation to a state purpose. In circumstances where a broad spectrum of the population is involved and where individual determinations are impractical; or where such determinations if they were to be made would be inconclusive, then the legislature must necessarily be arbitrary. Under such circumstances no specific point within the range is preferable to any other and the court cannot and will not substitute its judgment for that of the legislature. Examples cited by Appellants of such legislative line drawing and limited judicial review are the setting of minimum voting ages, *Oregon* v. *Mitchell,* 400 U.S. 112 (1970); minimum ages for jury service, *United States* v. *Duncan,* 456 F.2d 1401 (9th Cir. 1972); ages for selective service, *Smith* v. *United States,* 424 F.2d 267 (9th Cir. 1970); ages of de-

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[5] It should be noted that the first legislative response to the district court's decision was to enact into law S 1798 in July, 1974, amending Mass. Gen. Laws ch. 22, § 9(P). This statute creating the new rank of deputy superintendent and creating a second lieutenant colonel position, thus meets to a large extent whatever alleged stagnation may have been created by the decision.

pendents for tax exemptions, *Scarangella* v. *Commissioner*, 418 F.2d 228 (3rd Cir. 1969).

A similar circumstance arises when maximum ages for purposes of retirement must be set. Like determinations as to the age of reaching majority, there exists a range within which a determination as to mandatory retirement is proper even though there may be little differentiation from the ages within the range. For retirement this range begins at age 60 or perhaps even age 55. Thus mandatory retirement at age 70, *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd* 43 U.S.L.W. 3461 (U.S. Feb. 25, 1975); age 65, *Armstrong* v. *Howell*, 371 F. Supp. 48 (D. Neb. 1974); *Retail Clerks Union Local 77* v. *Retail Clerks Int'l. Assn.*, 359 F. Supp. 1285 (C.D. Cal. 1973); *Weiss* v. *Walsh*, 324 F. Supp. 75 (S.D.N.Y.), *aff'd*, 461 F.2d 846 (2d Cir. 1972) *cert. denied*, 409 U.S. 1129 (1973) (maximum age 65 for employment) and age 60, *Airline Pilots* v. *Quesada*, *supra*; *McIlvaine* v. *Pennsylvania*, 309 A.2d 801 (Pa. 1973), *aff'd*, 415 U.S. 986 (1974), fall within the accepted range.

The issues presented by the case at bar are different from the issues in those cases because, unlike those cases, the mandatory retirement age set by the statute in question does not fall within the range where fairness or a rational relation to a state purpose exists. The three-judge court correctly concluded that the cases cited by Appellant do not apply. The court was not dealing with a necessarily arbitrary legislative determination at the extremes of the age spectrum. The age here is not 70 or 60 but age 50. There is no broad spectrum of population making individualized testing impractical. Such testing already exists and the prognostic value of the examinations could not be questioned.

The issue in this case was not whether any particular age within a proper range was better than any other. All of the evidence showed that the mandatory retirement

age fell outside the range of fairness and rational relation to a state interest. The issue was whether the state could enforce the provisions of a mandatory retirement statute which incorporated a conclusive irrebuttable presumption that a fifty year old member was incapable of continuing in his job when the state's own medical testing proved the invalidity of the irrebuttable presumption. The district court correctly held that the state could not disregard its own determinations as to fitness and struck down the statute.

Conclusion

For the foregoing reasons the opinion of the district court should be affirmed.

Respectfully submitted,

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APPENDIX A

HOUSE . . . . . No. 2167

By Mr. Landry of Waltham, petition of Richard E. Landry relative to the retirement of certain employees in the Department of Public Safety. Public Service.

THE COMMONWEALTH OF MASSACHUSETTS

In the Year One Thousand Nine Hundred and Seventy-Five.

AN ACT RELATIVE TO THE RETIREMENT OF CERTAIN EMPLOYEES IN THE DEPARTMENT OF PUBLIC SAFETY.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

Paragraph (a) of subdivision (3) of section 26 of chapter 32 of the General Laws, as most recently amended by chapter 321 of the acts of 1958, is hereby further amended by striking out the second sentence contained therein and inserting in place thereof the following: — Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty-five or upon the expiration of such twenty years, whichever last occurs.

Supreme Court, U. S.
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No. 74-1044

In The Supreme Court of The United States

OCTOBER TERM, 1974

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

v.

Appellants,

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

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COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Massachusetts, dated July 21, 1972, dismissing the complaint is reported at 345 F. Supp. 1140. The memorandum of the United States Court of Appeals for the First Circuit, dated September 10, 1973, reversing the order of the District Court, is not reported. The opinion of the dis-

trict court of three-judges, dated May 31, 1974, is reported at 376 F. Supp. 753. The opinion of the district court of three-judges, dated December 12, 1974, is reported at 386 F. Supp. 179. The opinions below are reproduced as an appendix to the jurisdictional statement.

JURISDICTION

The district court on December 12, 1974 entered its order enjoining the Massachusetts Board of Retirement from enforcing Mass. Gen. Laws ch. 32, § 26 (3) on the grounds of the statute's unconstitutionality. The claim of appeal was filed with the district court on December 23, 1974. (A.J.S. 24-26). Appellants filed their jurisdictional statement on February 21, 1975. Probable jurisdiction was noted on May 19, 1975. 95 S.Ct. 1973 (1975). The jurisdiction of this Court is conferred by 28 U.S.C. § 1253.

STATUTORY PROVISION INVOLVED

The validity of Mass. Gen. Laws ch. 32, § 26(3) is involved. Said statute provides, in pertinent part:

> Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.

The text of the pertinent portion of the statute is found at page 210 of Volume 3A of the Massachusetts General Laws (West Publishing Company, 1966).

QUESTION PRESENTED

Whether Mass. Gen. Laws ch. 32, § 26(3) mandating the retirement of uniformed State Police officers at the age of 50 is constitutional?

STATEMENT OF THE CASE

Prior Proceedings:

On May 8, 1972, the Massachusetts Board of Retirement notified the plaintiff, Robert D. Murgia, that he would be retired on July 23, 1972, the day on which he would reach age 50. Murgia thereupon commenced a civil action in the United States District Court for the District of Massachusetts to enjoin the operation of the mandatory retirement statute, Mass. Gen. Laws ch. 32, § 26(3)(a). The complaint alleged that mandatory retirement at age 50 denied him equal protection of the laws, and he requested the convening of a three-judge court to adjudicate that claim. (A. 12-16). On July 18, 1972, a district court judge held a hearing to consider whether a three-judge court should be convened and whether a temporary restraining order should be issued.

The district judge denied the relief requested and dismissed the complaint for failure to raise a substantial federal question. 345 F. Supp. at 1144. (A.J.S. 9). The court ruled that the challenged statute was a valid exercise of state legislative power.

> Early retirement even of high-ranking officers gives younger men a chance for promotion and ensures that commanders possess the physical vigor to accompany their men in the field. These are surely legitimate purposes. Mandatory retirement at the age of 50 is at least a rational, if not the only, means of achieving them. 345 F. Supp. at 1142-1143. (A.J.S. 6).

Murgia appealed to the United States Court of Appeals for the First Circuit which reversed the order of the district court and remanded for the impanelling of a three-judge

court. In a one-paragraph memorandum, the Court of Appeals stated that being "mindful of the strictures of *Goosby* v. *Osser*, 409 U.S. 512 (1972) and of the ambiguities in *Frontiero* v. *Richardson* [411] U.S. [677] (May 14, 1973)" it was "unable to say that the claims presented afford 'no room' for controversy." (A.J.S. 10).

After remand, the Board of Retirement filed a motion to dismiss, essentially contesting the sufficiency of the complaint. (A. 17-18). The district court then set the matter down for hearing, ordering the parties to file a statement of agreed facts. (A. 6). Before the hearing, Murgia amended his complaint to challenge the retirement statute on due process as well as equal protection grounds. The retirement statute was claimed to have no rational relationship to any state interest and to create an irrebuttable presumption of unfitness to perform the duties of the State Police. (A. 22-23). Thereafter, the district court heard the motion to dismiss and denied it without prejudice. (A. 7). As the parties did not agree to the facts they filed a record consisting of depositions, affidavits and other documentary material. The district court allowed time for the filing of briefs and took the matter under advisement. (A. 7-8).

On May 31, 1974, the district court filed an opinion which declared that Mass. Gen. Laws ch. 32, § 26(3) was unconstitutional. The court ruled that "a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest." 376 F. Supp. at 754 (A.J.S. 12). The court "acknowledged that service in this branch is, or can be, arduous, and that high versatility is required, with few, if any, backwaters available for the partially superannuated." *Id.* (footnote omitted). The court also noted that "[e]ven plaintiff's experts concede that there is a general relationship between advancing age and decreasing physical ability

to respond to the demands of the job." 376 F. Supp. at 755. (A.J.S. 14). The court nevertheless concluded that the plaintiff had established the absence of any factual basis for mandatory retirement at age 50. 376 F. Supp. at 756. (A.J.S. 17).

The review of the factual record by the district court focused primarily on the availability of individual physical examinations. Every State Police officer is given a comprehensive medical examination every two years until age 40, and annually thereafter. Because individual testing was "not impracticable" and because "the relation between chronological age and functional age varies greatly from one individual to the next," the district court concluded that the standard set by the legislature was not reasonable. 376 F. Supp. at 755. (A.J.S. 14-15). The court stated that it must "look . . . in another direction for reasonableness—is there, for example, a greater risk at the higher age that the test, or, more exactly, the prognosis based upon testing, will be less reliable?" *Id.* (A.J.S. 15). The court then noted that no study had been made to demonstrate that a critical area is reached at age 50, and it made the judgment that no such determination could be made in this case. 376 F. Supp. at 755-56. (A.J.S. 16). The court held "that plaintiff has at least a recognizable interest in retaining his employment which the state can not deny arbitrarily and irrationally, . . . and [found] . . . that mandatory retirement of officers at 50 years of age bears no 'fair and substantial relation to the object of the legislation.' " 376 F.Supp. at 754 (A.J.S. 13) (footnote and citations omitted).

After a further hearing on the relief to be granted, the district court enjoined the operation of Mass. Gen. Laws ch. 32, § 26(3) and ordered the reinstatement of Murgia as Lieutenant Colonel in the State Police. The order was

stayed pending appeal. (A.J.S. 24). Murgia has received and continues to receive retirement benefits under the challenged statute. (A.J.S. 21).

Facts:

The uniformed branch of the Massachusetts State Police is organized in a para-military structure (R. Doc. No. 4, Rules and Regulations of the uniformed branch), and consists of approximately 850 officers. (A. 32, 48). Its primary law enforcement responsibility is the protection of life and property in the Commonwealth of Massachusetts. This requires, on the part of each uniformed officer, a physical and psychological capability to react with the strength and decisiveness such duties continually demand. For example, uniformed officers participate in "restoring and maintaining order in prison and civil disorders, responding to emergencies and natural disasters, patrolling highways in marked cruisers, investigating crimes and apprehending criminals." (A. 54-55). The uniformed branch also serves as the primary back-up force for the maintenance of law and order in the municipalities of the Commonwealth. In order to maximize the availability of uniformed officers for the performance of these duties, administrative functions such as radio dispatch work are assigned to civilians. (A. 57-58).

The extraordinary demands on uniformed officers are intensified by the fact that traditionally less strenuous work is assigned to an entirely distinct group, the detective branch of the State Police. The detectives perform the duties of "the investigation of crimes, the detection and the arrest of criminals, the collection of evidence, and the assistance of the preparation of cases in court." (A. 55). Occasionally members of the uniformed branch may perform

these functions as an incidental part of their front-line responsibilities, but in no event do detectives perform the functions of the uniformed officers. (A. 55).

The general operations of the uniformed branch are distinct from those of municipal police departments. As explained by the Commissioner of Public Safety:

> The uniformed branch is a relatively small force designed to cover the entire state. As a result, a state police cruiser is generally manned by only one officer, must cover a wide geographical area and may be as much as 30 minutes away from back-up assistance in case of an emergency. On the other hand, a municipal cruiser is generally manned by two officers, must cover a limited geographical area and is generally only a few minutes away from back-up assistance. (A. 57).

The enlistment age for uniformed officers is between 19 and 29. Mass. Gen. Laws ch. 22, § 9A. Applicants must pass a physical and a written examination and an agility test. (A. 126). Upon appointment a uniformed officer must pass the physical examination biennially until reaching the age of 40, and annually thereafter. (A. 146). There is no further agility test during an officer's career. The uniformed officer must retire "upon his attaining age fifty or upon expiration of . . . twenty years [of service], whichever last occurs." Mass. Gen. Laws ch. 32, § 26(3)(a). A uniformed officer may voluntarily retire before attaining age 50 if he has served for 20 years. Mass. Gen. Laws ch. 32, § 28A. Upon retirement, an officer receives a retirement allowance

> equal to one-half of the average annual rate of his regular compensation during the twelve-month period of his creditable service immediately preceding the date his retirement allowance becomes effective; provided, that the total amount of the allowance shall be increased

by one twelfth of one per cent for each full month of service in excess of twenty years' service and prior to the last day of the month in which such member will attain the age of retirement. Mass. Gen. Laws ch. 32, § 26(3)(c).

In contrast to the age 50 mandatory retirement law for uniformed officers, detectives in the Division of State Police are mandatorily retired at the age of 65. Mass. Gen. Laws ch. 32, §§ 1, "Maximum Age", 3(2)(g), "Group 4." The mandatory retirement age for municipal police officers is generally set at 65 or 70, depending on the municipality. Mass. Gen. Laws ch. 32, §§ 1, "Maximum Age", 3(2)(g), "Group 4."

There are also special statutory provisions for the disability retirement of uniformed officers. Retirement under ordinary disability is governed by Mass. Gen. Laws ch. 32, § 6. If a uniformed officer has completed fifteen years of service and has become "totally and permanently incapacitated for further duty," he may apply for an ordinary disability retirement allowance. Various options for payment are specified in Mass. Gen. Laws ch. 32, §12. However, "[r]etirement for [p]hysical or [m]ental [i]ncapacity [c]aused by [i]llness or [i]njury [i]ncurred in [p]erformance of [d]uty" is governed by Mass. Gen. Laws ch. 32, § 26(2). In addition, by virtue of Mass. Gen. Laws ch. 32, § 94, "any condition of impairment of health caused by hypertension or heart disease resulting in total or partial disability or death to a uniformed member . . . of the state police in the department of public safety . . . [shall] be presumed to have been suffered in line of duty, unless the contrary be shown by competent evidence."[1] The retirement

[1] This section also applies to members of certain fire departments and other police forces, and to certain employees of the Registry of Motor Vehicles, the Department of Correction and Logan International Airport.

allowance is 72 per cent of the average annual rate of compensation received during the last year of service. Mass. Gen. Laws ch. 32, § 26(2)(b)(i). The ordinary and accidental retirement provisions may also result in involuntary retirement according to certain statutory procedures set forth in Mass. Gen. Laws ch. 32, § 16.

In the proceedings below, three physicians testified concerning the general relationship between aging and the ability to perform physically stressful functions. Dr. Paul Murphy, the State Police Surgeon, testified as to his familiarity with the physical and psychological factors involved in performing State Police functions. (A. 142-145). According to his testimony, the impact of these factors on the physical condition of a uniformed officer coupled with the general decrease in the elasticity of the cardiovascular system occurring after the age of 40 results in an increased incidence of cardiovascular disease among the State Police. He testified that twice the number of uniformed officers between the ages of 40 and 50 as would be expected in the general population suffered from hypertension, a form of cardiovascular disease. His conclusions were that the average uniformed officer is not physically capable of performing the full duties of such an officer at the age of 50 and that uniformed officers should mandatorily retire upon serving 20 years or reaching the age of 50, whichever is earlier. (A. 172-173, 185). These conclusions apply to a high ranking uniformed officer because of the additional stress caused by command responsibilities in field operations. (A. 186-187). He also stated that a physician without particularized knowledge of the stress in State Police work and its impact on the physical condition of individual officers would be unable to form a reliable medical opinion concerning the rationality of mandating retirement at age 50. (A. 177-178).

On the basis of the considerable experience with the de-

velopment and enforcement of medical fitness standards with the National Guard, Dr. Murphy also made comparisons between the National Guard and State Police retirement systems. He considered the position of battalion commander to be analogous to that of the uniformed officer because of the required service in combat-like situations. The recommended retirement age for battalion commander is 45. (A. 180-182).

Dr. Thomas Dawber, a former career officer in the United States Public Health Service and presently an associate professor of medicine at Boston University, testified generally on the relationship between aging and ability to perform stressful functions. He acknowledged that the older the individual is, the greater the risk of incurring a malfunction of the cardiovascular system. In particular, he concurred that this relationship would hold true in cases of severe physical stress. (A. 73-74). In order to assess what the risk for any particular individual might be, "a detailed number of studies" would have to be conducted. The risk would nevertheless increase with age. (A. 77-78). He did not consider mental stress factors relevant to the question of cardiovascular disease, but recognized that other experts would disagree. (A. 90). His only knowledge of the State Police was based on a reading of various rules and regulations. (A. 89). From these, he asserted that one could not conclude that the average State Police officer is unable to perform his duties at the age of 50. This judgment was based in large part on the fact that at age 50 administrators have accumulated a considerable degree of organizational skill. (A. 84-86).

Dr. Thomas F. Silva, Jr., a surgeon, also testified. Based on a review of the rules and regulations, he concluded that mandatory retirement at age 50 was premature, in that a

man of 50 could perform the functions of a State Police officer. (R. Deposition of Dr. Thomas F. Silva, Jr., pp. 10, 11). He had performed no systematic study of the physical requirements of the State Police and conceded that the opinion of a medical expert with experience relating to the State Police would be entitled to more weight than that of one without such experience. (R. Deposition of Dr. Thomas F. Silva, Jr., pp. 20, 30).

The affidavit of Dr. Thomas Lee Kurt was also filed by the plaintiff. His opinions related generally to the variations between functional age and chronological age. He did not specify the means whereby functional age would be determined, nor was he able to relate his general comments to the particular content of the State Police functions. (R. Affidavit of Dr. Thomas Lee Kurt, pp. 3-9).

The three physicians, Murphy, Dawber and Silva, described the medical condition of the plaintiff Murgia as indicated by separate physical examinations. Dr. Murphy stated that Murgia was in good physical condition except that he had symptoms of presbyopia, a condition generally associated with aging and indicated by a loss of near vision and a mildly elevated systolic blood pressure. (A. 172). Dr. Dawber, based on an examination conducted entirely in his university office, stated that he was in generally good health except that his blood pressure was slightly elevated. (A. 66, 69). Dr. Silva also concluded that Murgia was "a healthy male of 51," (A. 112).

SUMMARY OF ARGUMENT

Massachusetts legislative history and this Court's interpretation of the Equal Protection Clause both establish that the statute mandating retirement at age 50 for uniformed State Police officers, Mass. Gen. Laws ch. 32, § 26(3)(a), is a legitimate, constitutional exercise of legislative power.

Appellants' first argument places the retirement statute within its full historical and statutory context. Massachusetts was an early leader in the development of such legislation for public employees. In 1911, it enacted the first general public employee retirement and pension system in the country. Since that time the Legislature has continually reassessed and modified its scheme, refining both retirement ages and pension benefits. Throughout its long experience, Massachusetts, like all other states and the federal government, has pursued two objectives: maintenance of an effective public labor force and provision of financial security for those who have served the state as public employees.

As part of its effort to better achieve these goals, Massachusetts has, over the years, set different ages of retirement according to the relative physical and psychological demands of the job. Like almost every other jurisdiction, it has singled out police forces and other agencies performing physically strenuous and hazardous tasks for early retirement. In this regard, Massachusetts has determined that uniformed State Police officers hold the most demanding positions in state government and, accordingly, it has set the lowest mandatory retirement age for these uniformed officers.

The second argument highlights the complex policy issues underlying any decision to modify retirement laws. The

ultimate judgment requires a deep understanding of the state's manpower needs and economic resources; inevitably, it will reflect the decision-maker's own social and economic philosophy. Such a question is singularly inappropriate for judicial resolution. Rather the issue needs to be tested through the dialogue and interplay of the legislative process.

Appellants' third argument turns to the district court's seeming application of the doctrine disfavoring conclusive or irrebuttable presumptions to this case. The irrebuttable presumption doctrine has no place in assessing the rationality of mandatory retirement laws. The district court would extend its use far beyond the paramaters outlined by the Supreme Court in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), and preceding cases. The natural extension of the district court's approach would result in subjecting exercises of legislative line-drawing to judicial revision whenever individualized determinations of the underlying issue were feasible. This approach would have dire implications for the legislative process and should be rejected.

Finally, appellants' fourth argument considers the only question of constitutional doctrine involved in this case, whether the mandatory retirement statute "rationally furthers some legitimate, articulated state purpose," and therefore meets the requirements of the Equal Potection Clause. Appellants submit that the gravamen of Murgia's challenge to the statute involves a disagreement about the wisdom of a legislative judgment. An examination of the legislative history of the Massachusetts retirement statutes discloses the legitimacy of the state's objectives, and the rationality of adopting a system of mandatory retirement linked with a guaranteed pension as the means of accomplishing these goals.

ARGUMENT

I. THE MASSACHUSETTS RETIREMENT LAW FOR UNIFORMED STATE POLICE OFFICERS IS ONE ELEMENT OF A COMPREHENSIVE RETIREMENT SYSTEM THAT REFLECTS SENSITIVE TREATMENT OF LEGITIMATE LEGISLATIVE CONCERNS.

A. *An Overview of the Massachusetts Statutory Scheme*

Appellants submit that the decision to set age 50 as the mandatory time for retirement of uniformed State Police officers cannot fairly be judged as an isolated legislative determination. It is one part of a long history of concern with both the effective operation of state government and the needs of those who have served the state for a substantial part of their lives. Placed in proper perspective, this legislative history discloses a process of rational deliberation and a sensitive accommodation of diverse policy issues that have earned judicial deference.

While both state and federal legislatures have long since committed themselves to the creation of public employee retirement and pension systems, Massachusetts, from the outset, has been a leader in these efforts. Its first statute, enacted in 1878, established a civilian retirement and pension plan providing for non-contributory disability pensions for policemen in the City of Boston serving fifteen years or more. Act of May 14, 1878, ch. 244, §5 [1878] Mass. Acts & Resolves 201. Between 1878 and 1909, further legislation was passed providing for pensioned age and service retirements of various other groups of public employees.[2]

[2] Firemen, other policemen, teachers, judges of probate and insolvency and prison officers were the employees covered by these early retirement and pension laws. *See, e.g.*, Act of April 18, 1900, ch. 246, § 1 [1900] Mass. Acts & Resolves 177 (authorizing cities to pension any member of a fire department who had reached 65 and had served 20 years, or who had served 20 years and was disabled); Act of June 15, 1892, ch. 378, § 1 [1892] Mass. Acts & Resolves 421 (authorizing cities of not less than 75,000 inhabitants to retire and pension any member of a police department who had reached 65 and had served fifteen years, or who had been permanently disabled in discharge of duty); Act of May 27, 1909, ch. 453, § 1 [1909] Mass. Acts & Resolves 454 (requiring the Metropolitan Park Commission to pension any of its police officers who were permanently disabled and requested retirement, and any officer serving 20 years if judged incapacitated for further service). *See also* Act of May 5, 1908, ch. 498, § 2 [1908] Mass. Acts & Resolves 451 (teachers); Act of June 12, 1906, ch. 474, §§ 1, 2 [1906] Mass. Acts & Resolves 647-48 (judges of probate and insolvency); Act of June 8, 1908, ch. 601, § 1 [1908] Mass. Acts & Resolves 640 (prison officers). For a discussion of all the pre-1910 Massachusetts retirement laws see Mass. H. Doc. No. 1400, at 130-132, 276-279 (1910).

Finally, in 1911, the Massachusetts Legislature established for the first time in the United States a general contributory retirement plan for all persons employed by the state. Act of June 7, 1911, ch. 532 [1911] Mass. Acts & Resolves 546. It is this statute that marks the beginning of governmental acceptance of responsibility for addressing the complex problems associated with aging public employees.

This first general retirement statute was, in retrospect, a very rough response, treating all public employees alike regardless of the nature of the job. The Act provided for voluntary retirement of all public employees at age 60 and mandatory retirement at age 70.[3] Upon retirement each employee received (1) an annuity derived from his compulsory past contributions of not more than 5 per cent of

[3] The Legislature also enacted in 1911 the first disability and retirement pension law specifically for the benefit of the State Police, as a supplement to the general scheme for public employees. Act of July 14, 1911, ch. 675 [1911] Mass. Acts & Resolves 800. This act provided in relevant part that "[a]ny member of the . . . [State Police] department who has performed faithful service for the commonwealth for not less than 20 years, and is, in the judgment of the governor, incapacitated for further service as a member of the said department, shall, if he so requests, be retired, and shall annually receive a pension equal to one half of the compensation received by him at the time of his retirement." The history of the Massachusetts retirement and pension laws for State Police is detailed in Part IB of this brief, pp. 22-26 *infra*.

salary and (2) a pension derived from payments by the Commonwealth equal to the employees' compulsory contribution. Act of June 7, 1911, ch. 532, §§ 5, 6 [1911] Mass. Acts & Resolves 550-553. *See generally* Mass. H. Doc. No. 1400, at 319-321 (1910).

In 1920, nine years after establishment of the Massachusetts retirement system, the United States Congress enacted the first general federal retirement law.[4] In the years since 1911 every state and many local governments have enacted similar measures, so that by 1972 it was estimated that 84 per cent of all state and local public employees—9.1 million individuals—were covered under government retirement plans.[5]

From the outset, retirement and pension legislation have sought to accomplish two objectives: the maintenance of an effective governmental service, and the provision of material support for the individual retiring worker. Every legislative document in Massachusetts takes these objectives as the basic premises of such laws. For example, the Legislative Commission which drafted the 1911 statute stated in its underlying report as follows:

> The problem of providing pensions for municipal employees has been urged upon the attention of the commission by representatives of the city government of Boston and of other cities, and by representatives

[4] Civil Service Retirement Act, Pub. L. No. 66-215, 41 Stat. 617 (1920). The Act provided for the mandatory retirement on an annuity of all employees in the federal classified civil service who had reached age 70 and had served fifteen years.

[5] Bureau of the Census, Social and Economic Statistics Administration, U.S. Dept. of Commerce, Census of Government 1972, 6 Topical Studies No. 1, *Employee Retirement Systems of State and Local Governments*, 1 (1973). For tables describing state and local retirement systems, by state, *see id.*, at 11-23.

> of the organized employees as well. The present practice of keeping on the municipal payroll superannuated workers who have lost their effectiveness means waste of the tax payers' money and demoralization of the working force. Considerations of economy and efficiency, not to mention other motives, demand the establishment of municipal pension systems. . . . We therefore recommend the passage of a bill to authorize the cities and the towns of this Commonwealth to establish retirement systems for their employees . . . .
>
> The same considerations that make for the expediency of pensioning municipal employees hold also in the case of other public employees,—those in the service of the State and the counties. Accordingly, we recommend further the enactment of bills providing for the establishment of retirement systems for State and county employees . . . . Mass. H. Doc. No. 1400, at 316 (1910).

The Commission then took recognition of the individual needs of the retired worker, proposing the creation of an annuity and pension fund by joint contributions of the governmental employer and the employee:

> It is just and right that the State, county, city or town should contribute something to the funds out of which pensions to superannuated employees are paid. Such contributions should be regarded as in the nature of extra compensation for long, faithful and efficient service; that is, in addition to the payment of current wages, the public employer pays a special extra allowance to workers who remain in the service a certain period of years and reach a certain age. This is the logical justification for contributions to pension funds

by employers of labor, whether private, corporate or public.

....

Regarded from the point of view of [the] fundamental principles embodied in the scheme, it might be described as a system of compulsory old age insurance for public employees, on a contributory and cooperative basis. Mass. H. Doc. No. 1400, at 318 (1910).

Over the years the Legislature has emphasized these same dual objectives in its continuing reassessment and refinement of public retirement laws. For example, the Special Commission to Study and Revise the Laws Relative to Retirement Systems and Pensions stated in its 1953 Report to the Legislature:

The Commission as the result of its study to date is fully in accord with the proposition that individual contributory retirement systems for public employees fulfill a useful and constructive purpose and are essential to the maintenance of a sound and progressive personnel policy in public administration. A contributory retirement system seeks to accomplish two broad purposes, namely,—to create a systematic method for retiring from the active working force superannuated and disabled employees, effectuating, by this process, an improved recruitment policy, the stablization of employment conditions through improved morale, and increased efficiency; and secondly, to give effect in the most economical manner to the social obligation by making provision for the employees against insecurity in old age and during disability and to aid the employees in the accumulation of reserves during their productive period to meet these emergencies. All of these

factors contribute to the value of the plans to the public as an employer. Translated into monetary terms, they partially, if not entirely, offset the appropriations by the governmental units for retirement and pension purposes. In the opinion of the Commission, contributory retirement and pension systems are fully justified by the governmental, social and economic advantages that accrue from their operation. Mass. H. Doc. No. 2190, at 8-9 (1953).

See also Mass. H. Doc. No. 2500, at 7-8 (1955).[6]

There should be no question that the Legislature's efforts to achieve a more effective governmental service consistent with the welfare of the individual public employee is a significant undertaking. Moreover, the means chosen—coupling retirement with pension benefits—carries a force of wisdom that is reflected in the fact that this policy has been adopted by government bodies throughout the country. At the same time, appellants recognize that a mandatory retirement plan involves the inevitable loss of individual public employees who remain willing and able to work beyond the prescribed retirement age. Ultimately, it is this consequence of legislative line-drawing that is under attack

[6] The dual purposes cited in these Massachusetts Reports are generally acknowledged as the objectives for all retirement and pension systems. For example, the legislative history of the federal Civil Service Retirement Act of 1920 reveals that the Congress articulated these same goals. The Senate Committee on Civil Service and Retrenchment stated in a Report on S. 1699 (which became Pub. L. 66-215):

> The main purposes to be accomplished by such legislation are:
>
> (1) Greater efficiency and economy in the Government service; and
>
> (2) A moderate provision for the material welfare of those who, by reason of length of service and their inability to longer render full or efficient service, are obliged to retire. S. Rep. No. 99, 66th Cong., 1st Sess. 2 (1919).

The rationales were re-emphasized in the 1966 Report of the Cabinet Committee on Federal Staff Retirement Systems:

in this case. Appellants submit, however, that resolving this inevitable problem by substituting individual determinations of fitness for an across-the-board approach would carry with it enormous difficulties which defy judicial adjustment. As a Commission on Pensions reported the Massachusetts Legislature in 1914:

> It would undoubtedly be most advantageous to the individual and most beneficial to the public service if each case could be treated entirely on its merit as to the time when the employee should be retired. The execution of such a plan among a large number of employees, however, offers obstacles which are well-nigh insurmountable. Mass. H. Doc. No. 2450, at 16 (1914).[7]

Essentially, state and federal legislatures have chosen to avoid the depressing and demeaning task of determining, on a case-by-case basis, when an individual has reached an elusive point of diminished productivity. The use of a single line avoids the psychological destruction inherent in an individualized judgment process and provides a sense of certainty to one's career in public service.

The concept of involuntary age retirement is that it provides an orderly and humane means of releasing personnel after a substantially full work-life and at an age when it may be presumed their efficiency and productivity are either already impaired, or about to become so because of infirmity. It has been justified in terms of maintaining a workforce of optimum capability, creating opportunity for the less senior members of the staff, obviating the need for the employer to adjudge numerous borderline cases of superannuation, removing the indignity or stigma associated with the preferment of charges, and enabling the prospective retiree to plan ahead with certainty. S. Doc. No. 14, 90th Cong., 1st Sess. 73 (1967).

[7] Similar concerns have been voiced at the federal level, from the time of the initial enactment of the 1920 Civil Service Retirement Act. *See e.g.*, 59 Cong. Rec. 6371 (1920); *Hearings Before the House Comm. on the Civil Service*, 77th Cong., 1st Sess. 43 (1941).

While making the judgment that individualized retirement determinations are unsound, the Massachusetts Legislature has sought to refine its across-the-board approach by varying retirement ages according to job classification. The Massachusetts Retirement and Pension System for Public Employees, as enacted in Mass. Gen. Laws ch. 32, classifies all governmental employees into four groups, depending on the nature of their occupations. Mass. Gen. Laws ch. 32, § 3(2)(g). Group 1 is the general category for public employees, comprising most positions in state and local government. The mandatory retirement age for Group 1 is 70 years; voluntary retirement with full pension benefits is permitted at 65. *Id.* §§ 1, "Maximum Age", 5(2)(a). Group 2 includes a wide variety of specified strenuous occupations, and mandates retirement at age 65, with voluntary, full-pensioned retirement at age 60. *Id.* Group 3, the classification at issue in this case, includes uniformed officers in the Division of State Police and mandates retirement at age 50; voluntary retirement with full pension benefits is permitted after 20 years' service, regardless of age. *Id.* §§ 26(3)(a), 28A. Group 4 includes, for the most part, other police forces and firemen in the state, among them the Detective Branch of the State Police. For this group, mandatory retirement is set at age 65, with voluntary-full-pensioned retirement permitted at age 55. *Id.* §§ 1, "Maxmum Age", 5(2)(a). *See generally* Mass. H. Doc. No. 5900, at 12-18 (1973).

The Legislature's efforts to refine the operative ages for retirement indicates that its primary motivation is to insure fair treatment of public employees. In this same vein, a brief examination of the statute's pension program will indicate that, unlike the frequent situations where statutes are justified primarily as money-saving devices, the Massa-

chusetts Retirement law is a major benefits program involving substantial costs.[8]

For example, in its 1973 Annual Report, the Massachusetts Retirement Law Commission compared retirement benefits paid to individuals in 1971 with those paid in 1963. It reported that for the later year, payments totalled $209,371,204 with 12.1 per cent funded by employee contributions, and the balance by government employers. This total more than tripled that of 1963 ($63,636,750), representing an annual growth rate of 15 per cent. The average retirement benefit for individuals in 1971 was $3,709, compared with $2,144 in 1963. Mass. H. Doc. No. 7642, at 9 (1973).[9]

B. *The Retirement Age for Uniformed State Police Officers*

Massachusetts is one of many jurisdictions, including the federal government, which prescribes a mandatory retirement age of 70 for the great majority of their employees while, at the same time, setting a lower mandatory retirement age for police officers, firemen, and others engaged in

[8] The skyrocketing cost of public employee pension systems to governmental employers is a well-established fact. *See, e.g.*, P. DEARBORN, JR., PENSIONS FOR POLICEMEN AND FIREMEN 5-8 (Labor Management Relations Service, National League of Cities, 1974); S. R. Weisman, *Soaring Costs Put a Pinch on City's Pension System*, N.Y. Times, June 23, 1975, § 1, at 1, col. 1.

[9] It is ironic to note that when the Commissioner of Public Safety, who serves as the head of the Division of State Police, proposed to a special Legislative Commission in 1938 that the mandatory retirement age be set at 45 for the uniformed State Police, the sole reason for the Commission's rejection of his proposal was the expense to the Commonwealth. The Commission felt that the added pension costs of such early retirements would impose too great a burden on the state's finances. Mass. H. Doc. No. 1582, at 8-9 (1938).

hazardous or physically demanding occupations.[10] For example, in 1972 Congress provided for mandatory separation of air traffic controllers at age 56, while permitting the Secretary of Transportation, in his discretion, to exempt a controller whom "he deems to possess exceptional skill and experience" until age 61. 5 U.S.C. § 8335(f)(Supp. III 1973), *amending* 5 U.S.C. § 8335 (1970). Further, a 1974 amendment to the same section requires law enforcement officers, such as agents of the Federal Bureau of Investigation, to retire at age 55 or after 20 years' of service, whichever later occurs, although the head of the agency may exempt the employee from retirement until he reaches 60. 5 U.S.C.A. § 8335(g)(Supp. 1975), *amending* 5 U.S.C.A. § 8335 (1967).

Turning specifically to State Police retirement statutes, a recent survey indicates that of the 23 states with separate State Police departments, 17 have prescribed varying mandatory retirement ages at 60 or lower, while only five have mandated retirement at age 65 or above.[11]

These special classifications systems reflect the need for physical strength, stamina, and alertness from persons performing demanding public safety functions. Legislatures have understandably sought to maintain a high level of public safety by requiring employees in these occupations to retire at a lower age than others performing less danger-

[10] Massachusetts is also similar to other jurisdictions in setting a *voluntary* retirement age lower than 70, permitting employees to obtain full retirement benefits if they exercise their option at the earlier age. Typically, the voluntary retirement age is set at 60. S. Doc. No. 14, 90th Cong., 1st Sess. 176 (1967). In Massachusetts the voluntary retirement age for most public employees is 65. See Mass. Gen. Laws ch. 32, § 5 (2) (a).

[11] DIVISION OF STATE AND PROVINCIAL POLICE, INTERNATIONAL ASS'N OF CHIEFS OF POLICE: COMPARATIVE DATA REPORT, 1974 at 109 (1975). The different retirement ages set forth in the study are: 50, 55, 56, 60, 62, 65 and 70.

ous and physically strenuous work. It is also notable in this regard, that in Massachusetts the Legislature has, within the Division of State Police itself, attempted to make a refined distinction in job skills in setting retirement ages. The age 50 retirement level applies only to the uniformed branch, while the non-uniformed detective branch, which carries out less demanding investigative functions, has a mandatory retirement age of 65. Mass. Gen. Laws c. 32, §§ 1 "Maximum Age", 3(2)(g) "Group 4." Plainly, Massachusetts has attempted to match age of retirement with relative job demands as closely as possible.

The distiction between the demands of firefighting, police work and less arduous types of work was recognized more than 60 years ago in Massachusetts. In 1914, a Commission on Pensions proposed to the Legislature an amendment to the 1911 retirement and pension law to set a mandatory retirement age of 65 "except in case of policemen and firemen for whom this age has been set at sixty. There [was] quite a universal agreement among all who were consulted that policemen and firemen should not be required to do active service beyond the age of sixty." Mass. H. Doc. No. 2450, at 16 (1914). *See id.* at 193. With respect to the uniformed State Police force, a Special Commission Report to the Legislature in 1938 took as a widely accepted premise the necessity for younger men to perform the job:

> The Division of State Police, by virtue of the nature of the work demanded of its members, undoubtedly requires comparatively young men of vigorous physique. The nature of the duties to be performed in all weathers is arduous in the extreme, and all but superior officers habitually perform service either mounted on horseback or on motorcycle. No argument is needed to demonstrate that men above middle life are not

> usually physically able to perform such duties. Mass. H. Doc. No. 1582, at 8 (1938).

Since 1938, the motorcycles and horses referred to above have been replaced as modes of transportation, but the recognition of the extraordinary demands of the job remains. For example, in *McCarthy* v. *Sheriff of Suffolk County,* Mass. Adv. Sh. (1975) 325, 322 N.E.2d 758 (1975), the Massachusetts Supreme Judicial Court stated:

> Examination of the various groups established by the statute discloses a legislative intent to provide for earlier retirement of those government officers concerned with the safety of the public. Thus, the statute provides for the early retirement of State Police officers, and other law enforcement personnel and those employed in positions involving potential danger to the safety of the public are also classified in groups having an earlier retirement age than that of general officials and employees. We find this classification to be clearly rational. . . . The sudden incapacitation of a government employee who is directly responsible for the safety of others presents a far greater danger to the public than that of an employee sitting behind a desk or doing general labor. Mass. Adv. Sh. (1975) at 336-338, 322 N.E.2d at 763-764 (footnotes omitted).[12]

[12] The same rationale is evident in congressional reports on the federal retirement systems. The Senate Report on H.R. 9281, which lowered the retirement age for F.B.I. agents and others and subsequently became Pub. L. 93-350, gave the following justification for its favorable report on the bill:

> The history of retirement legislation dealing with law enforcement officers and firefighters shows Congressional intent to liberalize retirement provisions so as to make it feasible for these employees to retire at age 50. This intent has been based on the nature of the work involved and the determination that these occupations should be composed, insofar as possible, of young men and women physically

Appellants recognize that the various statistics, reports, and judicial decisions cited do not, by themselves dispose of the constitutional question presented by this case; the doctrinal implications of the case under the Fourteenth Amendment are discussed later in this brief. Rather, appellants cite these reports and statistics to demonstrate that the imposition of early retirement ages for certain job classifications is part of a general effort to accommodate the needs of government with the needs of retiring public employees. Moreover, the variations among retirement ages prescribed by the states and the federal government for police employees underscore the fact that there is no uniform agreement about a single "appropriate" age of retirement or the precise criteria for setting a single retirement age. Accordingly, judgment should continue to be made by each state on the basis of its assessment of its own peculiar needs and resources.

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capable of meeting the vigorous demands of occupations which are far more taxing physically than most in the Federal Service. They are more occupations calling for the strength and stamina of the young rather than the middle aged. Older employees in these occupations should be encouraged to retire. S. REP. No. 93-938, 93rd Cong., 2d Sess. 2 (1974).

II. THE GROWING ARGUMENTS FOR A FLEXIBLE RETIREMENT SYSTEM CONTAIN COMPLEX, POLYCENTRIC IMPLICATIONS FOR STATE GOVERNMENT AND PUBLIC EMPLOYEES THAT DEMAND RESOLUTION WITHIN A LEGISLATIVE RATHER THAN A JUDICIAL FORUM.

In recent years knowledgeable advocacy organizations as well as government-appointed commissions and task forces have proposed the institution of flexible retirement systems which would not mandate retirement based soley on chronological age.[13]

These reports base their demands for reassessment of mandatory retirement laws on the extended capacities, longer life-spans and sheer increasing numbers of middle-aged and elder Americans.[14] Appellants recognize the force of these arguments, but urge that the single forum where change can properly be accomplished is the Legislature and not this Court.

The factors involved in any judgment of an across-the-board retirement age or in the system of retirement itself

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[13] 1971 White House Conference on Aging, Section Recommendations on Employment and Retirement 1-2, 4-5 (1971); U.S. Senate, Subcommittee on Aging of the Senate Committee on Labor and Public Welfare & United States Senate Special Committee on Aging, 93d Con., 1st Sess., Post-White House Conference on Aging Reports, 1973, at 72-73, 259-260 (Jt. Comm. Print 1973); Governor's Special Planning Commission on Elderly Affairs and the 1971 White House Conference on Aging, Report of the Task Force on Employment 2-4 (Mass., 1971). *See*, J.H. Schulz, Retirement: Background & Issues (1971 White House Conference on Aging, 1971).

[14] It was recently reported that there are presently more than 22 million persons over 65 in the United States, comprising 10 percent of the population. One-fourth of these elderly persons live below the federally-designated poverty level. In 1900, only 4 per cent of Americans were over 65. Hicks, *The Organized Elderly: A New Political Power*, N.Y. Times, June 23, 1975, § 1, at col. 7. See Schulz, *supra* note 13, at 4.

are diverse and often in serious conflict. They include, for example:

—the impact on the balance of equities that changing the retirement age for one agency would have on other public employees.[15]

—the relationship between the ability of public employees to obtain desirable private employment after retirement and appropriate levels of pension benefits;

—the need for legislative adjustment of pension options depending on the age of retirement, including e.g. improvement of after-death family benefits for higher retirement ages and enhancement of annual payment plans for lower age levels. *See* Mass. Gen. Laws ch. 32, § 12(2)(Supp. 1974).

—the effect that changing the retirement age would have on total pension costs, given the fact that pension payments are traditionally keyed to the individual's salary during the final years of employment. *See* Mass. Gen. Laws ch. 32, §§ 5(2)(a),(c)(Supp. 1974).

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[15] Interestingly, recent legislative reports in Massachusetts indicate that the general desire seems to be for lower retirement ages. Thus, a Special Commission concluded in 1973:

> While there may be justification for special rules for determining eligibility and benefit amounts for certain hazardous occupations, there has been a runaway trend to extend these special rules to ever-growing classes of employees. The result is discrimination, or just as real, the feeling of discrimination by the average public employee who sees no basis for a future claim that his job should be labelled as hazardous. It did not seem practicable to the Commission that these lower normal retirement ages for group 2 and 4 could be rolled back or that the groups be narrowed down to the more limited classes of earlier years. Hence if inequities are perceived, the only changes to be effected would require improving the group 1 rules; that is, by lowering the normal retirement ages either to 60 or 55 (Plans A and B respectively). Mass. Doc. No. 5900, at 38 (1973).

—the status of pension benefits as a morally—if not legally—vested right, with the consequent inability to make short term adjustments in pension costs during severe fiscal conditions.

Assessment of these factors demand a thorough understanding of the state's resources, economic conditions, and human needs. Moreover, the relevant judgments inevitably relate to changing social and economic philosophies. As stated by the Cabinet Committee on Federal Staff Retirement Systems in 1966:

> Underlying and emphasizing many of the differences in objectives and the difficulties in finding suitable solutions [to the problems of employee retirement systems] is a loose set of concepts and national attitudes still very much in transition. Formal retirement itself is a relatively new phenomenon in our society, and we are still quite ambivalent about it. . . .
>
> . . . .
>
> . . . Clearly no one social or economic philosophy can adequately explain all of the changing currents of the retirement movement. The society in which our retirement systems were originally designed was relatively static; today's society is characterized by a dynamism that we have not yet learned to assess adequately, much less cope with, and our retirement systems show the strain of the continuing effort to accommodate to this dynamism. S. Doc. No. 14, 90th Cong. 1st Sess. at 14-15.

Appellants' contention that the Legislature is the forum for considering changes in the Massachusetts retirement system might appear harsh if, as a practical matter, the Legislature had turned a deaf ear to these questions. However, the record discloses that the Massachusetts Legislature

continuously has engaged in precisely the sort of reassessment of retirement ages appellee now seeks from this Court.

Since the Massachusetts Commission of Old Age Pensions, Annuities and Insurance proposed the first general retirement law in 1910, there have been at least eleven special legislative commissions appointed to review and propose changes to the retirement system and to report their recommendations to the Legislature.[16]. Moreover, in 1958, the Legislature authorized the establishment of an independent Retirement Law Commission still active today, whose purposes are to:

> . . . [C]onduct continuing studies of the operation of all provisions of law relative to retirement allowances, pensions or annuities; the administration of pensions by state, county, city and town agencies; and . . . [to] study the potential cost of provisions of existing law and of all proposed changes. Said commission shall report annually to the governor and to the general court its activities and accomplishments, and such recommended legislation as may be necessary to effect desirable changes in the retirement law and to promote a more efficient administration thereof. It may prepare and publish reports for the information of employees concerning benefits available and procedures to be followed, and reports to the public to promote more adequate understanding of the retirement policies and problems of the commonwealth. Mass. Gen. Laws ch. 6, § 103, *as inserted by* Act of Oct. 3, 1958, ch. 623, § 2 [1958] Mass. Acts & Resolves 515.

[16] See Mass. H. Doc. 2450 (1914); Mass. H. Doc. No. 1203 (1921); Mass. S. Doc. No. 5 (1926); Mass. H. Doc. No. 3 (1932); Mass. H. Doc. No. 1582 (1938); Mass. H. Doc. No. 1950 (1945); Mass. H. Doc. No. 2000 (1948); Mass. H. Doc. No. 2190 (1953); Mass. H. Doc. No. 2737 (1953); Mass. H. Doc. No. 2763 (1953); Mass. H. Doc. No. 2500 (1955); Mass. H. Doc. No. 2849 (1957); Mass. H. Doc. No. 5900 (1973).

Pursuant to this statute the Commission has submitted annual reports to the Legislature commenting on proposed amendments to the Commonwealth's retirement laws as well as special reports on particular aspects of the retirement and pension system's operation. *See, e.g.,* Mass. H. Doc. No. 5316 (1967) (special report on the feasibility of changing the retirement ages and increasing the pension benefits for certain police officers and firemen).

The Commonwealth's continued willingness to consider adjustments in its retirement policy is nowhere more forcefully illustrated than in its treatment of the State Police. The Massachusetts State Police force first came into existence in 1865. Act of May 16, 1865, ch. 249 [1865] Mass. Acts & Resolves 631. The first retirement and pension law pertaining to the State Police was enacted in 1911. Act of July 14, 1911, ch. 675 [1911] Mass. Acts & Resolves 800. This law provided in part that a member of the force could request retirement if he had served not less than 20 years, but his request would only be accepted if, in the judgment of the Governor, he was "incapacitated for further service as a member of [the] department. . . ." The substance of this law remained unamended until 1939.[17]

In 1937 the Commissioner of Public Safety proposed legislation for a separate retirement fund covering State Police officers and a mandatory retirement age of 45. Mass. H.

[17] The changes during this period were mechanical and procedural ones, replacing the reference to "district police" appearing in ch. 675, § 1 [1911] Mass. Acts & Resolves with the words "state police," and transferring from the Governor to the Commissioner of Public Safety the power to act on a retirement request of a State Police officer. See Act of May 27, 1921, ch. 487, § 1 [1921] Mass. Acts & Resolves 590.

Doc. No. 513 (1937). The Legislature sent this bill, together with other proposed amendments to the retirement law, to a special commission for its analysis. Ultimately, the commission declined to recommend this bill's enactment, but in 1939 the Legislature did amend the retirement statute to provide for the mandatory retirement of State Police officers at age 50. Act of Aug. 12, 1939, ch. 503, § 3 [1939] Mass. Acts & Resolves 737-738.

Thereafter, in 1955, another special commission recommended to the Legislature that the normal retirement age for non-uniformed members of the State Police be raised from 55 to 60. It also recommended that the retirement age for uniformed members remain at 50, although it observed that there might be "some argument" for raising it above that age. It suggested that the retirement age for these members be reviewed regularly. Mass. H. Doc. No. 2500, at 22, 24 (1955). Similarly, a subsequent special commission reported to the Legislature in 1973 that among the "fundamental issues" it debated were questions relating to "Normal Retirement Age" and the overall concept of compulsory retirement. Mass. H. Doc. No. 5900, at 24 (1973). Thus it seems clear that the Massachusetts Legislature, not only as a matter of institutional competence but because of its actual commitment, is the appropriate forum in which to press for change.

III. THE IRREBUTTABLE PRESUMPTION DOCTRINE HAS NO PLACE IN ASSESSING THE CONSTITUTIONAL VALIDITY OF THE MASSACHUSETTS MANDATORY RETIREMENT AGE FOR UNIFORMED STATE POLICE.

A challenge under the Fourteenth Amendment to a state statute mandating retirement at a specific age—like every challenge to a statutory classification—involves two distinct levels of inquiry. At one level, the question is whether the retirement line drawn by the Legislature rationally serves a legitimate government objective. This is a substantive question traditionally considered within the framework of the Equal Protection Clause. *See, e.g., San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 40 (1973); *Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970). The second, separate level of inquiry is whether a particular individual falls above or below the retirement line. The essential concern here is whether the procedure used to classify the individual with respect to that line comports with the requirements of due process. *See, e.g., Goldberg* v. *Kelly,* 397 U.S. 254 (1970).

In holding Mass. Gen. Laws ch. 32, § 26(3) unconstitutional, the district court appears to have intermingled these two separate lines of inquiry. At one point, the court did find that the mandatory retirement provision of the statute bore no "'fair and substantial relation to the object of the legislation,'" citing *F.S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1920) and *Reed* v. *Reed,* 404 U.S. 71, 76 (1971). 376 F. Supp. at 754. This determination would seem to involve an inquiry into the substantive nature of the Legislature's classification scheme—a traditional examination of the constitutionality of its particular means-end justification. At bottom, however, the thrust of

the district court's holding was its belief that individual determinations of a particular officer's fitness were practicable and therefore made unnecessary the Legislature's resort to a single mandatory retirement line. This focus reflects a concern not for substance but for the process by which an individual officer is brought to retirement. It suggests that the district court utilized a second-level procedural analysis as its principal basis for answering in the negative the first-level inquiry into the statute's substantive rationality. In so doing, the district court misconstrued recent opinions of this Court interpreting the Fourteenth Amendment.

In these cases the Court has employed a procedural doctrine which disfavors "conclusive" or "irrebuttable" presumptions in a number of factual contexts which seem at first blush to raise only substantive questions of equal protection. *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). *United States Department of Agriculture* v. *Murry*, 413 U.S. 508 (1973). *Vlandis* v. *Kline*, 412 U.S. 441 (1973). *See Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Bell* v. *Burson*, 402 U.S. 535 (1971).[18] *See also Carrington* v. *Rash*, 380 U.S. 89 (1965).

The district court in comparing the Massachusetts State Police retirement statute to the pregnancy leave regulations at issue in *LaFleur*, *supra*, 376 F. Supp. at 756, appears to have considered the case at bar as falling within this recent

[18] In *Bell* v. *Burson*, *supra*, the Court invalidated on due process grounds a Georgia statute that required suspension of an uninsured driver's license and automobile registration if the driver was involved in an accident and failed to post security for the amount of damages claimed; the statute did not provide for any determination of fault. In *Stanley* v. *Illinois*, *supra*, the Court struck down, ultimately on the basis of the Equal Protection Clause, an Illinois statutory scheme that declared the children of an unmarried father wards of the state upon the death of the mother, with no determination of the father's fitness to be a parent. Although the Court

line of "irrebuttable presumption" cases. While there has been some question about the appropriate role of the irrebuttable presumption doctrine in Supreme Court adjudication,[19] appellants submit that the doctrine has no application to the Court's consideration of the constitutional questions raised in this case. Cf. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 376-377 (1973).

A comparison of the recent "irrebuttable presumption" cases with this case demonstrates that the factors prompting application of the doctrine are absent here. Whenever the doctrine has been applied, the Court has begun its analysis with a first-level inquiry into the rationality of the statutory or regulatory classification scheme under attack, examining it in light of the governmental purposes which the state has asserted it serves. In each case the Court has found the state's justifications for the scheme dubious at best and on some occasions wholly unsupportable. At this point, when the statute's veneer of rationality has been all

did not base either decision on the "irrebuttable presumption" doctrine, the cases may be viewed as precursors to the *Vlandis*, *Murry* and *LaFleur* cases. It is important to note however, that the statutes under challenge in *Bell* and *Stanley* already provided for individual administrative hearings. The critical issue in *Bell* was whether the hearing called for should consider the factor of liability, 402 U.S. at 536, 541. In *Stanley*, the issue was whether the hearing on parental fitness accorded other classes of parents in child neglect proceedings should also be accorded unwed fathers, 405 U.S. at 646-647, 658.

[19] *See, e.g., Cleveland Bd. of Educ.* v. *LaFleur*, 414 U.S. 632, 652 (Powell, J., concurring), 657, 660 (Rehnquist, J., joined by Burger, C.J., dissenting); *United States Dept. of Agric.* v. *Murry*, 413 U.S. 508, 524, 525 (Rehnquist, J., joined by Burger, C.J., and Powell, J., dissenting); *Vlandis* v. *Kline*, 412 U.S. 441, 460-62 (Burger, C.J., joined by Rehnquist, J., dissenting), 466, 467-69 (Rehnquist, J., joined by Burger, C.J., and Douglas, J., dissenting); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974); Note, *Irrebuttable Presumptions: An Illusory Analysis*, 27 STAN. L. REV. 449 (1974).

but stripped away under the Court's scrutiny, the Court has turned to the irrebuttable presumption doctrine. The Court has underscored the vulnerability of the statute by pointing out that the state's asserted objectives could be served as well by individual determinations, with less substantial impairments of personal interests.

Thus in *Vlandis* v. *Kline*, 412 U.S. 441 (1973), the Court considered a Connecticut statute which provided that students would be classified as nonresidents for university tuition purposes if they had a legal address outside the state at the time of application for admission. The state advanced three justifications in defense of its classification plan: it furthered the valid state interest of equalizing higher education costs between residents and nonresidents; it served to distinguish between old and new residents and to reward the former for tax contributions by offering a lower tuition fee; and it provided the administrative certainty necessary for the state to prevent non-residents from fraudulently obtaining the lower resident rates of tuition. With respect to the first, the Court found that "basing the bona fides of residency solely on where a student lived when he applied for admission to the University is using a criterion wholly unrelated to that objective," 412 U.S. at 448-449. With respect to the second, favoring established residents over new ones, the Court stated that the statute made no such distinction on its face, and that "the State cannot now" assert this type of after-the-fact rationale. *Id.* at 449. Moreover, the statute "would not always operate to effectuate the State's asserted interest." *Id.* Finally, the Court rejected the interest in administrative certainty because, standing alone, it was an insufficient justification for the statute's arbitrary definition and classification of non-residents. With the rationality of the legislative scheme thus under siege, the Court then turned to the Due Process

Clause, stating that in this situation "reasonable alternative means for determining bona fide residence are available" which would permit individualized determinations of residence to replace the statutory presumption of nonresidence. *Id.* at 451. Indeed, the Court points out that the state itself through its Attorney General had already set forth reasonable criteria for making these determinations. *Id.* at 451, 454.

United States Department of Agriculture v. *Murry*, 413 U.S. 508 (1973), presents a similar two-step analysis. The statute under challenge was a 1971 amendment to the Food Stamp Act of 1964, denying eligibility to any household that included a person aged eighteen or older who had been claimed as a tax dependent for the previous year by a member of another household that was itself ineligible. The amendment purported to serve the legislative purpose of preventing abuses of the Food Stamp program by non-needy households. 413 U.S. at 512-513. However, when the amendment was examined in relation to this objective, the Court found it to be doubly irrational: first, tax dependency in a prior year was entirely irrelevant to the nutritional need of the dependent in the following year; second, regardless of this problematical time lag, tax dependency of one individual clearly had no relation to the nutritional need of the rest of the household in which he lived. *Id.* at 513-514. Having thus undermined any claim of rationality for the statutory classification, the Court then delivered a final blow to the scheme by observing briefly that it rested "on an irrebuttable presumption often contrary to fact" and therefore lacked certain "critical ingredients of due process. . . ." *Id.* at 514. *See also United States Department of Agriculture* v. *Moreno*, 413 U.S. 528, 538 (1973).[20]

[20] It should also be noted that the *Murry* case involved a federal and not a state statute. Accordingly, the constitutional challenge to its validity

These decisions should not govern the Court's consideration of Mass. Gen. Law ch. 32, § 26(3). As demonstrated in Part I *supra*, the Massachusetts determination to retire uniformed State Police at age 50 has always been designed to serve the dual purposes of maintaining a physically sound police force consistent with providing financial benefits in recognition of the individual's extended service and continuing economic needs. The federal government and many states have enacted similar mandatory retirement laws for their police forces to further the identical governmental purposes. Appellants suggest that the traditional and widespread existence of such laws attest to their continued ability to serve their intended purposes. Indeed, this Court has already accepted the validity of mandatory retirement schemes. *McIlvaine* v. *Pennsylvania*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974) (mandatory retirement of State Police at age 60); *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd*, 95 S. Ct. 1319 (1975) (mandatory retirement of federal civil servants at age 70). Thus, in contrast to the statutes involved in *Vlandis* v. *Kline*, *supra*, and *United States Department of Agriculture* v. *Murry*, *supra*, no summary rejection of the rationality of Massachusetts' State Police retirement law can be made. As a result, there is no basis for calling the doctrine of irrebuttable presumptions into play.[21]

Nor is this case controlled by *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974), despite the suggestion of the district court to the contrary. 376 F. Supp. at 756. In *LaFleur* the Court struck down school board rules which mandated maternity leaves for pregnant teachers beginning their fifth or sixth months of pregnancy. 414 U.S. at 647-648. The school boards advanced two justifications for these rules: continuity of instruction and the necessity of keeping physically unfit teachers out of the classroom. *Id.* at 640-641. The Court rejected the arbitrary cut-off dates embodied in the rules as bearing no rational relation to this first objective, finding that they actually would frustrate the goal of continuity in many instances. *Id.* at 643. Turning to the second objective, the Court recognized that the rules did serve "to insulate the classroom from the presence of potentially incapacitated pregnant teachers" but found that they swept too broadly by establishing in effect "a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing." *Id.* at 644. The Court held that this conclusive presumption was "neither 'necessarily [nor] universally true,'" and in violation of the Due Process Clause. *Id.* at 646.

Although there is a superficial similarity between *LaFleur* and this case—appellants here similarly contend that the mandatory retirement statute under challenge furthers the valid state purpose of maintaining a physically fit State Police force—critical factors differentiate the two cases. Intimately intertwined with the pregancy regulaions were fundamental interests in privacy and the family which the Court increasingly has found deserving of special protection. Indeed, the majority opinion of the Court in *LaFleur* begins with a reference to these interests:

> This Court has long recognized that freedom of per-

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was necessarily made under the Due Process Clause of the Fifth Amendment rather than the Equal Protection or Due Process Clause of the Fourteenth Amendment. The same is true of *United States Dept. of Agric.* v. *Moreno*, *supra*, although the amendment to the Food Stamp Act at issue there was in fact considered within the framework of equal protection analysis. 413 U.S. at 538.

[21] The question of the statute's rationality is addressed at length in Part IV *infra*.

> sonal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment. . . . As we noted in *Eisenstadt* v. *Baird*, 405 U.S. 438, 453, there is a right "to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."
>
> . . . Because public school maternity leave rules directly affect "one of the basic civil rights of man," *Skinner* v. *Oklahoma* . . . the Due Process Clause of the Fourteenth Amendment requires that such rules must not needlessly, arbitrarily, or capriciously impinge upon this vital area of a teacher's constitutional liberty. 414 U.S. at 639-640 [citations omitted].

Accord, Stanley v. *Illinois*, 405 U.S. 645, 651 (1972). No such fundamental interest compels the use of the irrebuttable presumption doctrine in this case. Indeed, appellants submit that the appellee's asserted interest in continued public employment in fact does not fall within the scope of the Due Process Clause of the Fourteenth Amendment. When Murgia joined the uniformed State Police in 1948, the governing Massachusetts statute, Mass. Gen. Laws ch. 32, § 26(3) explicitly mandated retirement at age 50. His expectancy in job continuity was therefore no different than that asserted by the plaintiff in *Board of Regents* v. *Roth*, 408 U.S. 564 (1972)—an expectancy which this Court held did not constitute a "property interest" under the Fourteenth Amendment. *Id.* at 578.[22] *See also Arnett* v. *Kennedy*, 416 U.S. 134, 152-154, 155 (1974) (plurality opinion).

[22] The district court cited the *Roth* case in a footnote, stating that: "To the extent that it may affect plainiff's due process rights, see *Board of Regents* v. *Roth* . . . , we note that after six years of service no officer who passes the physical can be denied reenlistment. Mass. G.L. c. 22, § 9A." 376 F. Supp. at 754, n. 4 [citations omitted]. However, the court nowhere confronts the fact that at the time Murgia entered the State Police force, the law explicitly imposed a definite limit on length of service.

Apart from the compelling privacy undertones in *LaFleur*, that case is further distinguishable on its record. In striking down the rules mandating maternity leaves at five and six months of pregnancy the Court stressed that every expert medical witness in the proceedings below had agreed that "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter." 414 U.S. at 645-646. This agreement indicated that until the very last weeks of pregnancy, *no* general relationship could be shown between that condition and physical capacity to teach. *Cf. id.* at 647, n.13. At the same time, the weight of the evidence apparently established that a significant number of teachers were in fact capable of working beyond the cut-off dates established by the school boards. See *id.* at 646, *id.* at 645-655 (Powell, J., concurring.) The case now before the Court presents precisely the reverse situation. As stated by the district court, "[e]ven plaintiff's experts concede that there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." 376 F. Supp. at 755. However, there was no agreement—and indeed no specific evidence—that a great many State Police officers would be able to perform their jobs adequately after the age of 50. The only specific evidence introduced was the physical condition of the single plaintiff. The one doctor who had experience with the medical condition of a broad range of State Police officers testified in detail as to why in his opinion the average officer was unfit at the age of 50. See Statement of the Case, pp. 9-10 *supra*.

Thus in contrast to the record in *LaFleur*, the record in

this case offers no showing that the legislative judgment of diminishing ability embodied in § 26(3) is contrary to fact. Accordingly, appellants urge that this case, again in contrast to *LaFleur*, is not one in which individualized determinations are a proper alternative to the statutory classification scheme.[23]

In equating the case at bar with *Cleveland Board of Education* v. *LaFleur, supra,* the district court failed to recognize these significant differences between the two cases. The court did suggest that individualized determinations would not be constitutionally required if the legislative line had been "drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is preferable to any other." 376 F. Supp. at 755. However, it offered no criteria for locating the point where the range of fairness ends and a zone of unfairness begins. Nor did the court indicate how it would determine what constitutes "some appreciable state interest." Rather the court concluded that since individualized medical screening was available and indeed already required in some instances, and since appellants had failed to show that such medical testing would be useless at age 50, *id.* at 755-56, the retirement line drawn by the Massachusetts Legislature was unconstitutional.

Appellants respectfully suggest that the district court's holding in this case is not only erroneous but contains dis-

[23] Furthermore, although the Court in *LaFleur* did not rely on such intimations, it did note that the records in *LaFleur* and its companion case suggested "the maternity leave regulations may have originally been inspired by other, less weighty, considerations" such as keeping visibly pregnant teachers out of the students' sight. 414 U.S. at 641, n. 9. *See also Id.* at 653 (Powell, J., concurring). The record in this case offers not the slightest implication that the Massachusetts Legislature was intending to further inappropriate or improper purposes through its mandatory retirement law. To the contrary, see Parts I-II *supra.*

turbing implications for the continued viability of the legislative process. The logical extension of the holding would subject every exercise of legislative line-drawing to judicial revision if in fact individualized determinations could be made, particularly where the results of those determinations would show that the line drawn did not result in the perfect classification of every affected individual. This is precisely the result feared by Justice Rehnquist in his dissenting opinion in *LaFleur* where he stated that the extention of the Court's opinion might well lead to the invalidation of mandatory retirement laws. He prophesied that:

> In that event federal, state, and local governmental bodies will be remitted to the task, thankless both for them and for the employees involved, of individual determinations of physical impairment and senility. 414 U.S. at 659.[24]

Appellants urge that the Court recognize the substantial differences between the recent "irrebuttable presumption" cases and the present case and find that the doctrine has no place here.

[24] In citing the fears expressed by Justice Rehnquist in *LaFleur* appellants do not question the Court's holding in that case. Rather they suggest that potential misunderstanding about the parameters of the irrebuttable doctrine would extend the doctrine to reach beyond the narrow confines of *LaFleur* itself, with the unfortunate results prophesied by Justice Rehnquist.

IV. THE MASSACHUSETTS MANDATORY RETIREMENT AGE FOR UNIFORMED STATE POLICE IS RATIONALLY RELATED TO A LEGITIMATE, ARTICULATED STATE OBJECTIVE.

The ultimate question in this case is whether Mass. Gen. Laws ch. 32, § 26(3), mandating the retirement of uniformed State Police officers at the age of 50, violates the Equal Protection Clause. Its resolution requires the Court to consider the underlying question whether the statute "rationally furthers some legitimate, articulated state purpose . . . ." *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1, 17 (1973); *McGinnis* v. *Royster*, 410 U.S. 263, 270 (1972). *See also F.S. Royster Guano Co.* v. *Virginia*, 253 U.S., 412, 415 (1920).[25] Applying this test,

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[25] The cited "rational relationship test" is clearly the appropriate standard of review in this case, rather than the alternative standard of strict judicial scrutiny. Neither of the traditional prerequisites for applying the more rigorous standard is present here. Age has never been treated as a "suspect classification" by the Court and should not be, for it contains

> none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. *San Antonio Ind. School Dist.* v. *Rodriguez, supra* at 28.

Similarly, the right to public employment has never been considered a fundamental interest "explicitly or implicitly guaranteed by the Constitution." *Id.* at 33-34. Indeed, in the context of federal public employment, the Court has held that absent an entitlement created by applicable legislation, such employment can be summarily denied or terminated. *Arnett* v. *Kennedy*, 416 U.S. 134, 152 (1974). *Cafeteria Workers* v. *McElroy*, 367 U.S. 886, 896 (1961). As the Court stated in the *San Antonio* case, *supra*, "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." 411 U.S. at 33. *See Weisbrod* v. *Lynn*, 383 F.Supp. 933, 936-937 (D.D.C. 1974), *aff'd*, 95 S. Ct. 1319 (1975). Moreover, in its opinion the district court itself purported to use the "rational relationship" standard. 376 F. Supp. at 754.

the dual objectives referred to in Part I, *supra*, are plainly legitimate. And while one may debate the wisdom of 50 as the retirement age for uniformed State Police officers, the history and context of this legislative determination establish its rationality. The statute therefore is constitutional.

Neither the Massachusetts Contributory Retirement Law in general nor the particular section concerned with uniformed State Police officers constitutes an aberrational or unique legislative scheme. In addition to Massachusetts every state as well as the federal government has established a mandatory retirement and pension system for its public employees to further the combined purposes of promoting effective government service and providing for the financial security of the retired worker. (See pp. 14-19, *supra*.) Most states and the federal government have also prescribed a lower mandatory retirement age for their police officers than for other occupations in order to maintain a vigorous, active and healthy force. (See pp. 23-25, *supra*.) The reasonableness of such provisions has been upheld in several cases. *See, e.g., McIlvaine* v. *Pennsylvania*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed*, 415 U.S. 986 (1974); *Air Line Pilots Ass'n, Int'l* v. *Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 336 U.S. 962 (1962); *McCarthy* v. *Sheriff of Suffolk County*, Mass. Adv. Sh. (1975) 325, 322 N.E.2d 758 (1975). Cf. *Hodgson* v. *Greyhound Lines, Inc.*, 499 F.2d 859 (7th Cir. 1974), *cert. denied*, 95 S. Ct. 805 (1975). In light of this unanimous national experience—both legislative and judicial—the rationality of the Massachusetts retirement and pension scheme cannot be denied. The only significant question remaining is whether the particular designation of 50 as the mandatory retirement age for its uniformed State Police is in and of itself a rational line for the Massachusetts Legislature to draw.

Classification by age is a traditional and well-established legislative power, employed in a variety of contexts and approved by the courts. *See, e.g., Oregon* v. *Mitchell,* 400 U.S. 112, 206-207 (opinion of Harlan, J.), 243-244 (opinion of Brennan, White and Marshall, JJ.), 294-295 (opinion of Stewart, J.) (1970); *Cf. Stanton* v. *Stanton,* 95 S. Ct. 1373 (1975). The district court itself recognized the existence and indeed necessity of this legislative prerogative. 376 F. Supp. at 755. Given the acknowledged authority of a legislatiure to draw lines on the basis of age and the presumption of validity to which its legislation is entitled, *Lindsley* v. *Natural Carbonic Gas Co.,* 220 U.S. 61, 78 (1911), the record of this case supports a finding that retirement of uniformed State Police officers at 50 is a rational choice well within the bounds of legislative discretion.

As the district court acknowledged in its opinion, "there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job." 376 F. Supp. at 755. It also recognized "that the duties [of the uniformed State Police officers] are sufficiently more arduous than, or the physical and mental stresses significantly different from, those of detectives or policemen in the other branches and at other levels of government, so that there is no viable unequal protection claim in this area." 376 F. Supp. at 754, n.3. Appellants submit that the existence of these two elements alone satisfied whatever burden they bore to demonstrate the rationality of the legislative determination, and required the district court to uphold the constitutionality of the challenged statute. *Cf. Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970).[26]

[26] Apart from its determination that the availability of individualized determinations of an officer's capacity to continue on the job rendered the statute irrational – a conclusion discussed in detail at pp. 34-42 *supra* –

Moreover, the evidence offered by the appellee in no way undermines the statute's validity. The only specific evidence appellee introduced related to his own generally healthy condition. While he may not be unfit or even have a relatively low functional age, such a fact hardly serves to invalidate the legislative determination. "[E]very line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial function." *Village of Belle Terre* v. *Boraas,* 416 U.S. 1, 8 (1974) (footnote omitted). *See Dandridge* v. *Williams,* 397 U.S. 471, 485 (1970); *McGowan* v. *Maryland,* 366 U.S. 420, 425-426 (1961); *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 51

the district court appears to have based its finding of irrationality on its interpretation of certain statistical evidence introduced. Thus it pointed to two sets of statistics concerning non-injury disability retirements and non-injury disability retirement waivers for officers between the ages of 40 and 50 and stated that "[t]he statistics furnish no reason to suppose that age 50 is within, or even significantly approaching, a range where changes of conditions warrant a change of treatment. Rather they contradict it." 376 F. Supp. at 756, and n. 7. The difficulty with the court's conclusion is that the statistics present only half the picture. They furnish no evidence that after the age of 50 the non-injury disability retirement rates do not increase significantly, thus making 50 in fact the critical turning point the court seemed to require. *See* 376 F. Supp. at 755. It is true that such statistics probably do not exist, as the mandatory retirement age of 50 has been in effect since 1939. The point is, however, that under the governing "rational relationship" standard of review, appellants did not have the burden of establishing 50 as a turning point in order that the statute's constitutionality be sustained. Having demonstrated that age is related to performance as a State Police officer and that the demands of the job are more strenuous than other types of police work, its burden was satisfied. *See, e.g., Jefferson* v. *Hackney,* 406 U.S. 535, 546-47 (1972).

The second type of statistical evidence relied on by the District Court was a list of statutes showing Massachusetts to be the only state mandating retirement of its state police at 50.

This evidence is not controlling. As mentioned above, see pp. 25-26 *supra,* the very lack of uniformity of retirement ages mandated by the different states demonstrated that there is no single accepted age of retirement against which the Massachusetts statute can be judged.

(1973). Furthermore, as shown by the varying opinions of the physicians who testified, there is no widespread agreement on the appropriate retirement age for State Police officers. The determination of such an age involves difficult judgments about the relationship between aging and physical and psychological capability. It will inevitably be based on conflicting and speculative medical opinion. Recently the Court has observed:

> When Congress undertakes to act in areas frought with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, *arguendo*, that judges with more direct exposure to the problem might make wiser choices. *Marshall* v. *United States*, 414 U.S. 417, 427 (1974) (consitutionality of Title II of Narcotic Addict Rehabilitation Act of 1966).

The physicians' testimony introduced by appellee clearly demonstrates that the medical judgments relating to retirement are fully as uncertain as those referred to in the *Marshall* opinion.

Quite apart from attempting to resolve a problem with medical dimensions, it is significant that the Massachusetts Legislature here has developed far more than a regulatory scheme. The challenged statute represents an effort to mesh retirement provisions with pension benefits—regulating certain terms of public employment it is true, but at the same time extending to those employees some guarantee of financial security once they retire from their jobs.[27] Like the Texas school financing system challenged in *San*

[27] Moreover, as the legislative history of the Massachusetts retirement laws demonstrates, in many cases the impetus for legislation mandating or permitting earlier retirement came from the public employees themselves. *See* pp. 16, 27 n. 14 *supra*.

Antonio Independent School District v. *Rodriguez*, 411 U.S. 1 (1973), "... in substance, the thrust of the ... [Massachusetts retirement and pension] system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the States under the Constitution." 411 U.S. at 39 (footnotes omitted). *See also Marshall* v. *United States, supra* at 428 (1974).

It may be argued that Massachusetts' determination to retire its uniformed State Police officers at 50 does not represent the wisest retirement line that could be drawn. Appellants respectfully suggest that here, as in so many complex areas of judgment, the disposition to criticize the Legislature's choice diminishes as one moves from the level of the abstract and begins to appreciate the diverse and conflicting factors demanding accommodation. Moreover, decisions of this Court have declared plainly that judgments as to the wisdom or soundness of such determinations are not for the courts to make. Thus in the recent case of *Kahn* v. *Shevin*, 416 U.S. 351, 356 n.10 (1974), the Court noted:

> The dissents argue that the Florida Legislature could have drafted the statute differently, so that its purpose would have been accomplished more precisely. But the issue, of course, is not whether the statute could have been drafted more wisely, but whether the lines chosen by the Florida Legislature are within constitutional limitations. The dissents would use the Equal Protection Clause as a vehicle for reinstating notions of substantive due process that have been repudiated. "We have returned to the original constitutional proposition that courts do not substitute their social and economic beliefs for the judgment of legislative bodies

> [which] are elected to pass laws." *Ferguson* v. *Skrupa*, 372 U.S. 726, 730.

Accord, Dandridge v. *Williams*, 397 U.S. 471, 487 (1970); *Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 489 (1955). The deference to the legislative process emphasized in *Kahn* is clearly warranted here. The history of retirement legislation in Massachusetts demonstrates the state's sensitivity to suggestions for change and its commitment to continuous reexamination of its retirement law policy. See Part II, pp. 29-32, *supra*.

In summary, Mass. Gen. Laws ch. 32, § 26(3) must be viewed through a doctrinal prism sensitive to legislative history and the complex medical, social, and economic factors that inhere in legislative judgments. Such an examination reaffirms the "original constitutional proposition" that such judgments are peculiarly within the legislative competence. In this regard, the Court's description of the Texas school financing system at issue in the *San Antonio* case, *supra*, graphically expresses the essence of the Massachusetts retirement system:

> The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. In giving substance to the presumption of validity to which the Texas system is entitled . . ., it is important to remember that at every stage of its development it has constituted a "rough accommodation" of interests in an effort to arrive at practical and workable solutions.

> . . . One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution. We are unwilling to assume for ourselves a level of wisdom superior to that of legislators, scholars, and educational authorities in 50 States, especially where the alternatives proposed are only recently conceived and nowhere yet tested. The constitutional standard under the Equal Protection Clause is whether the challenged state action rationally furthers a legitimate state purpose or interest. . . . We hold that the Texas plan abundantly satisfies this standard. 411 U.S. at 55 [citations omitted].

Accordingly, this Court should hold that the Massachusetts retirement statute for its uniformed State Police officers rationally furthers a legitimate, articulated state purpose.

CONCLUSION

For the reasons stated above, the order of the district court should be reversed.

Dated: July 17, 1975

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1974

No. 74-1844

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT, ROBERT Q. CRANE, ANGELO AMATO and JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT, JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT, and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

vs.

ROBERT D. MURGIA,

Appellee.

On Appeal from the United States District Court for the District of Massachusetts

BRIEF FOR APPELLEE

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In The

Supreme Court of the United States

October Term, 1974

No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellants,

vs.

ROBERT D. MURGIA,

Appellee.

On Appeal From The United States District Court For The District of Massachusetts.

BRIEF FOR APPELLEE

STATUTORY PROVISIONS INVOLVED

The validity of Mass. Gen. Laws ch. 32, §26(3)(a) is involved, which provides, in pertinent part:

> "Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs."

The text of the pertinent portion of the statute is found at page 210 of Volume 3A of the Massachusetts General Laws (West Publishing Company 1966).

Chapter 32 of the Massachusetts General Laws, of which §26(3)(a) is a part, is entitled Contributory Retirement System for Public Employees. Under that chapter, the Massachusetts Board of Retirement is established and empowered to mandatorily retire employees under Mass. Gen. Laws ch. 32, §5(1)(a) which provides in pertinent part:

> "Any member in service shall be retired for superannuation upon attaining the maximum age for his group . . . ."

The text of the pertinent portion of the statute is found at page 29 of the supplement to Volume 3A of the Massachusetts General Laws (West Publishing Company 1975).

Mass. Gen. Laws ch. 22, §9A to which Mass. Gen. Laws ch. 32, §26(3)(a) refers is the statute under which the state police is created and provides in pertinent part:

> "Whenever the governor shall deem it necessary to provide more effectively for the protection of persons and property and for the maintenance of law and order in the commonwealth, he may authorize the commissioner to make additional appointments to the division of state police . . . .
>
> The appointment of the additional officers herein provided for shall be by enlistment for terms not exceeding three years . . . . The commissioner may . . . make rules and regulations for said additional force, including matters pertaining to their discipline, organization and government, compensation and equipment, and means of swift transportation . . . .
>
> No officer appointed under this section shall be denied re-enlistment if he has served satisfactorily for six years or more; provided, that he has passed such physical examination as is prescribed by rules and regulations made hereunder . . . ."

The text of the pertinent portion of the statute is found at page 119 of the supplement to Volume 2A of the Massachusetts General Laws (West Publishing Company 1975).

QUESTION PRESENTED

Did the district court err in determining that the classification established in Mass. Gen. Laws ch. 32, §26(3)(a), which requires mandatory retirement for superannuation at age 50 of members of the Uniformed Branch of the Massachusetts State Police, lacks a rational basis in furthering any state interest and therefore violates the Equal Protection Clause of the Fourteenth Amendment?

STATEMENT OF THE CASE

Prior Proceedings

On May 8, 1972 the Massachusetts Board of Retirement notified the appellee, Robert D. Murgia, as follows:

> "According to the birth record on file with this Board, you will attain age 50 on 7-23-72, which is the maximum age for Group 3 in which you are classified.
>
> In accordance with section 5 (1) (a) of chapter 32 of the General Laws, you must retire for superannuation as of the date on which your 50th birthday occurs" (R. Letter of Board of Retirement to Robert D. Murgia).

Thereafter on July 7, 1972, Murgia commenced a civil action in the United States District Court for the District of Massachusetts, alleging that the operation of the mandatory retirement statute, Mass. Gen. Laws ch. 32, §26(3)(a), denied him equal protection of the laws and requesting the convening of a three-judge court to adjudicate his claim in accordance with 28 U.S.C. §§2281, 2284 (1970) and for interlocutory relief.

After a hearing on the request for the convening of a three-judge court, the district judge dismissed the complaint for failure to raise a substantial constitutional question. The plaintiff appealed the decision to the United States Court of Appeals for the First Circuit, which on September 10, 1973 ordered that the judgment of the district court be set aside and the case be remanded for the impanelling of a three-judge court.

The three-judge panel was designated on October 16, 1973. On October 26, defendants filed a motion to dismiss the complaint. The parties requested that a hearing be scheduled after January 11, 1974 and indicated that, there appearing to be no real dispute as to the factual basis of the claim, an agreed statement of facts could be submitted prior to the hearing.

Thereafter on January 18, 1974 the court set the matter down for hearing and ordered the parties to submit the agreed statement of facts prior to the hearing. Plaintiff filed an amended complaint. Defendants' motion to dismiss was heard on March 13, 1974 and was denied. The parties were ultimately unable to agree on a statement of facts. The plaintiff therefore filed a request for admissions of fact and the defendant filed its response of defendants to request for admissions. The parties

waived the presentation of evidence at a hearing and submitted a joint record consisting of depositions, affidavits, the plaintiff's request for admissions of fact, defendants' response and other documentary material. Each party filed briefs and the court took the matter under advisement.

On May 31, 1974 the district court in an opinion written by Senior Circuit Judge Bailey Aldrich declared Mass. Gen. Laws ch. 32, §26(3)(a) unconstitutional and void because it violated plaintiff's right to equal protection of the laws under the Fourteenth Amendment to the Constitution.

In so ruling, the court found that the plaintiff had succeeded in showing that the challenged statute lacked a rational basis because there was not a fair and substantial relation of the statutory classification to the object of the legislation. The court did not reach the plaintiff's alternate contentions that the right to employment should be considered a fundamental interest and that age should be considered a suspect classification.

In its opinion, the court acknowledged the fact that service in the Uniformed Branch of the Massachusetts State Police was arduous and required high versatility. *Murgia v. Massachusetts Board of Retirement,* 376 F. Supp. 753, 754 (hereinafter cited as 376 F. Supp.____). The court expressly stated that the statutory object of maintaining a vigorous and capable force was fully justified. It further noted that none of this was challenged by the plaintiff. 376 F. Supp. at 754.

The court also specifically affirmed the propriety of legislative classification based upon arbitrary line-drawing in

many, if not most, circumstances (376 F. Supp. at 754). It held, however, that this undeniably proper legislative function does not permit the legislative use of such arbitrary classification in total disregard of accurate and detailed information which the state itself had gathered where such information shows that the legislative classification was unrelated to the valid purposes of the statute. 376 F. Supp. at 756.

The court found that the legitimate legislative object of maintaining vigorous, healthy personnel was not served by a classification which required mandatory retirement at age 50, because this classification totally disregarded the individualized determinations of fitness made by the state through the elaborate medical screening system uniformly applied to each member from the time he enlisted until he retired. *Id.*

The evidence showed that, pursuant to the granting of authority contained in Mass. Gen. Laws ch. 22, §9A, the Commissioner of Public Safety had established comprehensive fitness standards entitled Medical Fitness Standards for Initial Appointment to the Massachusetts State Police (A193-256). The members were required to maintain these standards throughout their career in order to continue to serve as state police officers (A129-133). The member's fitness was measured by individual medical examination against the established standards at the time of initial enlistment and every two years thereafter upon the member's biannual application for reenlistment (A146, 148). Beginning at age 40 and continuing on an annual basis until retirement, the officer was examined using the identical standards as applied to the initial recruit (A148). In addition, the over-40 officer was annually given an electrocardiogram andwas

tested for gastro-intestinal bleeding (A148). If a member was found to have a physical defect which would impair his duties and functions as a state police officer, he was declared unfit and retired from service unless he obtained a waiver from the Commissioner of Public Safety to continue (A156-158). After the member's sixth year in service, passage of the physical examination became the sole criterion for continued service. Mass. Gen. Laws ch. 22, §9A. Passage of the physical examination was the official determination that the officer was fully qualified to continue in service (Request for Admission, No. 55; Response of Defendants, No. 55; A42-43, 52) (hereinafter "F55").

Because of these undisputed facts and the fact that the plaintiff had passed his physical examination three months prior to being retired and had been declared fully fit to continue, Mass. Gen. Laws ch. 32, §26(3)(a) was held to establish an irrational classification because it required mandatory retirement for superannuation for a group which had already been individually tested and been classified as fit.

After a further hearing on the nature of relief to be granted held on October 22, 1974, the court entered an order enjoining the defendants, the Board of Retirement and the Commissioner of Public Safety, from enforcing Mass. Gen. Laws ch. 32, §26(3)(a) against the plaintiff.

Facts

The defendant, the Commonwealth of Massachusetts Board of Retirement (hereinafter "Retirement Board"), is an

administrative agency of the Commonwealth of Massachusetts charged with the administration of the retirement system for state employees established under Mass. Gen. Laws ch. 32. The individual defendants Crane, Amato and Maloney are the three members of the Board who administer the system. The individual defendant Callanan is the Executive Secretary of the Board, and the individual defendant Kehoe is the Commissioner of Public Safety of the Commonwealth.

The Massachusetts State Police is established under Mass. Gen. Laws ch. 22 and represents the statewide police force for the Commonwealth of Massachusetts (F7). The Uniformed Branch consists of approximately 880 members (F11) and is organized in a paramilitary fashion (R. Rules and Regulations of the Uniformed Branch of the Massachusetts State Police) for the primary purpose of providing protection for persons and property and for the maintenance of law and order. Mass. Gen. Laws ch. 22, §9A (F33). Its specific duties are defined in Rules and Regulations of the Uniformed Branch of the Massachusetts State Police, *supra,* and include road patrolling on state highways, responding to general emergencies, natural disasters and civil disorders, the prevention and detection of crime, the apprehension of criminals and providing support as a back-up force for local law enforcement officials (A54-55, 57-58, F33, 36).

To qualify for initial appointment as a member of the Uniformed Branch, each applicant must meet the medical and psychological fitness standards established in the Medical Fitness Standards for Initial Appointment to the Massachusetts State Police (A193-256). The standards are adopted almost word

for word from those used by the United States Army (A129-130). The examination includes the taking of a thorough medical history, a urine examination, a blood serology, chest x-ray, audiometric examination, and tests to determine color vision, near vision or distant vision, blood pressure, pulse, height and weight, color hair, color eyes and body build. The physician then examines the following areas for defects: head, face, neck and scalp, nose, sinuses, mouth and throat, ears, eardrums, eyes, opthalmoscopic, pupils, ocular motility, lungs and chest, heart, vascular system, abdomen, viscera, anus and rectum, endocrine system, G-U system, upper extremities, feet, lower extremities, spine, identifying body marks, skin-lymphatics, neurologic and psychiatric systems; in some instances an EKG is performed (A133-137).

The examination is made under the direction of the State Police Surgeon (A119-120, 132-133), who uses as his assistants in this duty, medical specialists of every type including "surgeons, internists, neurologists, opthalmologists, radiologists, [and] urologists" (A187-188). The medical records become part of the officer's permanent file (A137-138). Failure to meet the medical fitness standards results in denial of enlistment (A128-129). The applicant must also pass an agility test, a written examination and an oral interview (F12). The initial enlistment term is for a period of two years (F14). After the initial term the member may choose to reenlist for an additional two-year term (F13, 14). In that event, the member must again be examined and found to be fit to perform his duties. His medical records are reviewed, he is interviewed by the Police Surgeon (A150), and he is subjected to reenlistment medical and psychological examinations which are identical to those administered under Medical Fitness Standards

for Initial Appointment to the Massachusetts State Police (A148). If the member is found to be unfit to perform his duties, he may not continue to serve in the state police without a specific waiver from the Commissioner of Public Safety (F24, 25, 26, 27, 29). Thereafter, with the passage of each succeeding two-year period, the member may reenlist for an additional two-year term. Should he decide to do so, in each instance he must again be subject to the reenlistment physical and be found fit to perform his duties (A146).

Beginning at age 40 the physical fitness criteria for continued service are made more rigorous. The member is subjected to the same examination but on an annual basis with the addition of an electrocardiogram and tests for gastro-intestinal bleeding (A148). An officer who is found not to be able to perform his duties is retired unless he obtains a specific waiver from the Commissioner of Public Safety (A156-157; F29).

Plaintiff Robert D. Murgia was born on July 23, 1922 and joined the Uniformed Branch of the Massachusetts State Police on April 7, 1948 (F74, 75). The plaintiff served satisfactorily in every rank and office he held (F77), and on March 1, 1967 he was appointed Lieutenant Colonel, the highest rank in the Uniformed Branch of the Massachusetts State Police (F76). In March 1972, the plaintiff was given his mandatory physical examination by the State Police Surgeon and declared to be fully qualified to continue his duties (F78). On his 50th birthday in July 1972, he was mandatorily retired for superannuation (F80).

In the proceedings below the Commonwealth acknowledged that all state police officers who pass the physical examinations are fit to perform all of the duties assigned to members of the Uniformed Branch of the Massachusetts State Police. Specifically, the Commonwealth admitted:

> ". . .When a member passes his re-enlistment or annual physical, he is found to be qualified to perform all of the duties of the Uniformed Branch of the Massachusetts State Police" (F55).
>
> "A member's physical condition as it relates to his ability to perform the duties of the Uniformed Branch is determined at annual and/or re-enlistment physical examinations; members who pass the physical examinations are determined able to perform the duties of the Uniformed Branch" (F60).

The Commonwealth admitted that 50-year-old officers are capable of performing the duties of Massachusetts State Police officers, depending upon their individual physical condition (F59). The Commonwealth admitted that despite the determination of fitness, members at age 50 are forced to retire solely because of their age.

> "Members who pass the physical examinations and are fully qualified to continue in service must retire if they are fifty years of age and have twenty years of service" (F63).

In addition to the admissions, the depositions of three doctors were put into evidence. Dr. Thomas R. Dawber, the head of the cardiovascular epidemiology section of the Evans Department of Medical Research of the Boston University School of Medicine and director of the Framingham Heart study, testified that the aging process differed vastly from one individual to another (A81) and that medical testing provides reasonably accurate predictions of initial fitness (A77-79).

Dr. Thomas F. Silva, Jr., a surgeon and the physician for the Boston Celtics Professional Basketball Team, testified that men of 50 were capable of performing the physical duties which might be required of a state police officer (R. Deposition of Dr. Thomas F. Silva, Jr. at 7-9).

Colonel Paul Murphy, the State Police Surgeon, testified that he was responsible for the promulgation of the medical fitness standards for the Massachusetts State Police (A129-130) and that he was responsible for the testing of each member of the Uniformed Branch (A132-133). He testified that the duties of the state police required vigorous personnel (A142-147); that the evidence of cardiovascular disease in the state police in the age 40-50 range was the same as in the general population (A175-176); that certain men over 50 were capable of performing the duties of state policemen (A173); that duty in the state police is like battalion commander duty in the National Guard which is a combat position (A181-182).[1] He testified that he had examined

1. Appellants in their brief have stated that "[t]he recommended retirement age for battalion commander is 45" (Brief for Appellants at 10). Colonel Murphy stated that battalion commander retirement is established by National Guard Regulation 600-100 which he read into the record as follows:

(Cont'd)

the plaintiff and found him fully capable of performing the duties of a state police officer (A191).

Each of the doctors had examined the plaintiff and found him in good physical condition (A69, 112, 191).

SUMMARY OF ARGUMENT

The decision of the three-judge panel of the United States District Court for the District of Massachusetts in this case does not represent a sweeping attack upon age-based legislative classifications, mandatory retirement statutes or an improper application of the holding of this Court in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). Rather, it is a decision bearing upon a particular and unique factual situation which correctly applies the conventional rational basis test under the Equal Protection Clause of the Fourteenth Amendment to the irrational operation of a statutory classification. The decision should be affirmed by this Court.

(Cont'd)

> "Officers In TOE — that is, Table of Organization & Equipment — are expected to be of suitable age for their positions on mobilization. It is realized that age alone is not always a valid criterion in determining suitability for a position. Consequently, much depends on the type of unit and the individual's ability, knowledge, skill, experience, vigor and general value to the service. As a general rule, however, officers should not be assigned to TOE units if their age exceeds that shown below. Officers now holding TOE positions will not be removed solely because their ages exceed that shown" (A181-183).

These regulations pertain to recommended maximum ages for *initial appointment*. They are guidelines only, not fixed requirements. The regulations specifically provide that officers whose ages exceed the recommended age will not be removed for that reason.

Appellee's first argument reviews the analysis used by the district court in deciding the issues before it. The court chose to employ the rational basis test under the Equal Protection Clause and rejected a strict scrutiny test. It did not reach potential issues under the Due Process Clause. The court applied the rational basis test in a two-step procedure; first, determining the legitimate state interests and then determining whether the classification bore any rational relation to those interests. The lower court properly adopted the Commonwealth's own statement as to the purpose of the legislation — to maintain a fit and vigorous state police force. This is an undisputedly proper state interest.

The court next turned to the operation of the classification which mandatorily retired state police officers at age 50 for superannuation. Pursuant to the statutory scheme, the state police officers were regularly screened for fitness by individualized medical testing. Those who failed the rigorous examination procedures were separated from service with the result that those who remained were fully fit to perform the duties of the Uniformed Branch of the Massachusetts State Police. The Commonwealth admitted that the statutory classification forced the retirement of officers who were fit to continue. This anomalous result led to the district court's conclusion that the operation of the classification was irrational.

After determining that the reasons advanced by the Commonwealth in support of its classification were insufficient, the court attempted to find justification for the statute on grounds such as its legislative history and the national experience relating to similar classifications. It finally considered

the possibility that the individualized testing lacked predictive validity at age 50. None of these factors supported the rationality of the classification. The district court was therefore correct in concluding that the operation of the classification is irrational.

The appellee's second argument analyzes the district court's reference to this Court's decision in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974). The court did not employ the irrebuttable presumption doctrine in its decision. Its reference to *LaFleur* was proper because of this Court's extensive analysis in that case of mandatory discharge statutes, employee fitness and individualized testing, all of which are the central issues in this case. Of particular relevance is this Court's discussion in Part III of the *LaFleur* decision, which pertains to the operation of a statutory across-the-board fitness classification upon employees who had already been individually medically screened and classified as fit.

Appellee's final argument compares the state interest in maintaining its classification with the interest of the individual in retaining his employment. Appellee submits that the state interest is minimal. The individual interest, however, is substantial because the state's meritless classification results in grave difficulties in obtaining new employment at age 50. The argument concludes that strong public policy arguments, evidenced by the national and state legislative efforts to eliminate age discrimination, support the lower court's finding that the challenged classification is irrational.

ARGUMENT

I.

THE DISTRICT COURT WAS CORRECT IN DECIDING APPELLEE'S CLAIM IN TERMS OF THE RATIONAL BASIS TEST UNDER THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

The appellee brought this action in the district court alleging that mandatory retirement for superannuation at age 50, pursuant to Mass. Gen. Laws ch. 32, §26(a), was a violation of his civil rights of due process and equal protection. He alleged that the statute requiring his mandatory retirement denied him due process because it created an unwarranted conclusive presumption that he was incapable of continuing his duties because of his age, whereas, in fact, he was fully fit to continue (A22, 23). He further alleged that the statute denied him equal protection of the laws because it had no rational relationship to any state interest in the effective operation of the Massachusetts State Police (A22).

Appellee argued that in ruling on his equal protection claim, the court should use a strict scrutiny standard because his mandatory retirement, based solely on his age and in disregard of his fitness, was based upon a classification which is suspect. Appellee contended that his mandatory retirement based upon age alone was an infringement of his fundamental right to employment. The appellee asserted that the challenged statute should be upheld only upon a showing by the state that it had a

compelling interest in maintaining the effecting law. Finally, appellee argued that even if the court determined that the lesser, rational basis, standard was the appropriate one, the statute still did not accord him equal protection of the laws (R. Appellee's Trial Brief at 4-35).

The district court did not adopt the appellee's contentions that a classification based upon age *per se* was inherently suspect or that the operation of the statute denied him a fundamental right to employment. Nor did the court adopt the appellee's due process claim that the statute created an irrebuttable presumption. *Murgia v. Massachusetts Board of Retirement,* 376 F. Supp. 753, 754 (D. Mass. 1974).

The court limited its inquiry to a single issue: whether the classification based on age 50 alone lacks a rational basis in furthering any substantial state interest. *Id.* at 754. The lower court did not adopt the strict scrutiny standard of review which is appropriate in cases where the subject statute employs a suspect classification[2] or interferes with a fundamental right.[3] Rather, it adopted the less rigorous rational basis test, as set out in this Court's opinion in *F. S. Royster Guano Company v. Commonwealth of Virginia,* 253 U.S. 412, 415 (1920), which the district court noted was quoted with approval by this Court in *Reed v. Reed,* 404 U.S. 71, 76 (1971). *See Stanton v. Stanton,* 95 S. Ct. 1373, 1377 (1975). In *Royster,* this Court articulated the rational basis test as follows:

2. *See, e.g., Brown v. Board of Education,* 347 U.S. 483 (1954).

3. *See, e.g., Shapiro v. Thompson,* 394 U.S. 618 (1969).

> "It is necessary to say that the 'equal protection of the laws' required by the Fourteenth Amendment does not prevent the States from resorting to classification for the purposes of legislation. Numerous and familiar decisions of this court establish that they have a wide range of discretion in that regard. But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 253 U.S. at 415.

The lower court's selection of the rational basis test for the analysis of the issue before it was appropriate. The rational basis test affords the state broad discretion. Under this test, the statute is presumed valid. *McGowan v. Maryland,* 366 U.S. 420, 425 (1961); *Lindsley v. Natural Carbonic Gas Company,* 220 U.S. 61, 78 (1911). The burden is upon the party challenging the statute to overcome this presumption. *San Antonio Independent School District v. Rodriguez,* 411 U.S. 1, 55 (1973). The district court fully recognized the presumption and the burden which is placed on the appellee to show the irrationality of the statute. 376 F. Supp. at 754, 756.

Although the statute before the lower court involved questions of age discrimination and denial of employment, which touch fundamental interests of the individual, it also involved elements of state economic and social regulation which are accorded a high degree of respect by the court. *See*

Dandridge v. Williams, 397 U.S. 471, 485-486 (1970). Also, the court must accord deference to a state in the selection of its own officers and agents. *Kotch v. Board of River Port Pilot Commissioners,* 330 U.S. 552, 557 (1946). In addition, it is a state's undeniable right to require high standards of qualification for its personnel. *See Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232, 239 (1957).

The appellants suggest in their first and second argument that the Court should not exercise even this deferential standard of review. The Commonwealth states, that because of the complex issues pertaining to mandatory retirement involved in this statute, the legislature should be free to establish these policies exclusive of judicial review.

The legislature may not so operate in total isolation. Even in cases which relate solely to issues of broad economic and social regulations and do not infringe upon rights so fundamental to the individual as employment and discrimination based on age, this Court has insisted that the statutory classification bear some rational relationship to the purposes of the statute. *See McGowan v. Maryland, supra,* 366 U.S. at 425, 426; *Two Guys from Harrison-Allentown, Inc. v. McGinley,* 366 U.S. 582, 590 (1961).

A. The District Court Was Correct In Determining The Statutory Object Or Purpose Of Mass. Gen. Laws ch. 32, §26(3)(a) Was The Maintenance Of A Fit And Vigorous Massachusetts State Police.

The lower court applied the rational basis test to the challenged statute in a two-step procedure, wherein the court first determined the object or purpose of the legislation and then

measured this object against the classification to determine whether a rational relationship existed. 376 F. Supp. at 754, 755.

In determining the object or purpose of the legislation, the lower court looked to the language of the statute, *see Marshall v. United States,* 414 U.S. 417, 422-423 (1973), the entire statutory scheme, *Kotch, supra,* 330 U.S. at 557, the legislative history, *Two Guys from Harrison-Allentown, Inc. v. McGinley, supra,* 366 U.S. at 584, 585, the interpretations placed on the legislation by the state courts, *Eisenstadt v. Baird,* 405 U.S. 438, 451 (1972), and facts properly the subject of judicial notice, *Lindsley, supra,* 220 U.S. at 79, *see Kahn v. Shevin,* 416 U.S. 351, 353 (1974).

In addition to these factors, the district court considered the purposes articulated by the state. *San Antonio Independent School District v. Rodriguez, supra,* 411 U.S. at 17; *McGinnis v. Royster,* 410 U.S. 263, 270 (1972). *See* Gunther, *Foreward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection,* 86 Harv. L. Rev. 1 (1972). The Attorney General of the Commonwealth has purported to draw upon portions of the legislative history of the challenged statute and of the broad Massachusetts Retirement Statute in general, judicial decisions pertaining to related matters and various statistics and reports (Brief for Appellant at 15-26).

In the lower court the Attorney General suggested that early retirement improved the morale of the Uniformed Branch by fostering rapid promotions. New members could be promoted to fill the ranks vacated by those mandatorily retired under the statute. The court analyzed this alleged purpose and concluded

that it lacked substance. 376 F. Supp. at 754, 755. *See Eisenstadt v. Baird,* 405 U.S. 438, 448-449 (1972); *Weinberger v. Wiesenfeld,* 43 U.S.L.W. 4393, 4397 (U.S. March 18, 1975); *Wiesenfeld, supra,* at 4399 (concurring opinion of Rehnquist, J.). The district court said:

> "We dispose readily of certain of the state's contentions. Its argument that early retirement enhances the morale of the younger members, in a sense assumes the point. Of course, if there are only younger members, they are happier than the older members who are being eliminated. This does not add up on balance, but merely advances the time of ultimate unhappiness. The same can be said with respect to the alleged desirability of rapid promotion; the attractiveness of quick promotion must be weighed against the unattractiveness of early retirement. Furthermore, to the extent that the purpose of early retirement is said to be to empty higher ranking positions after they have been occupied by one person for a reasonable time, the cut-off at 50 years is of questionable consequence since it is unrelated to the period of time the retiree has occupied his last position. The alleged desirability of facilitating rapid promotion by early retirement, rather than a justification, will be seen on analysis to be age discrimination *per se.*" 376 F. Supp. at 754, 755.

The court noted that it would have conceded the validity of the morale argument if officers not capable of carrying their full

load were to be retained, but concluded that this would not occur because of the fitness standards used by the state police. 376 F. Supp. at 754 n.5.

Appellants appear not to have challenged the lower court's treatment of these contentions and have not pressed these purported justifications in this Court.

The second statutory purpose advanced by the Commonwealth was of greater substance and pertained to the maintenance of personnel who were capable of performing the arduous and hazardous duties of the Uniformed Branch of the Massachusetts State Police.

The appellants continue to rely upon this statement of statutory purpose in their brief before this Court and have articulated the statutory objective as ". . . the need for physical strength, stamina and alertness from persons performing demanding public safety functions" (Brief for Appellants at 23-24). It is an undisputedly proper purpose for the state to require fit personnel. *Shelton v. Tucker,* 364 U.S. 479, 485 (1960). It was accepted as a valid state purpose by the court below. 376 F. Supp. at 754.

B. The District Court Was Correct In Finding That The Statutory Classification Was Irrational Because It Operated To Retire For Superannuation State Police Officers Who Had Been Administratively Declared Fit To Continue In Their Employment.

After the district court found a valid state purpose, it proceeded to the second step in the application of the rational

basis test, which is the determination of whether the purpose is in any way furthered by the statutory classification.

At the outset it was apparent that the age classification employed in the statute in this case is in some respects similar to the classifications used in that category of legislation which uses age as the determining factor in a broad range of circumstances.[4] Because of this similarity and because the lower court made reference in its decision to this Court's decision in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), the appellants have erroneously overstated the impact of the lower court's decision upon age-based classifications. The appellants contend that the district court's decision is:

> "not only erroneous but . . . contains disturbing implications for the continued viability of the legislative process. The logical extension of the

4. Age is used as a criterion of selection and grouping of people for a wide variety of purposes. For example, Massachusetts law makes age a factor in the following areas, among others: (1) adoption, Mass. Gen. Laws ch. 210, §§1, 2; (2) criminal prosecution eligibility, M.G.L. ch. 119, §74; (3) consumption of alcoholic beverages, M. G.L. ch. 138, §34B; (4) driving motor vehicles, M.G.L. ch. 90, §§8A, 8B; ch. 90B, §26; (5) state employment, M.G.L. ch. 31, §5B; ch. 22, §9A; (6) private employment, M.G.L. ch. 112, §§55, 101; ch. 147, §24; (7) employment in dangerous occupations barred to minors, M.G.L. ch. 149, §§60 *et seq.*; (8) majority, M.G.L. ch. 4, §7; (9) marriage, M.G.L. ch. 207, §9; (10) jury duty, M.G.L. ch. 234, §1; (11) voting, Mass. Const. Amend., Nov. 3, 1970, art. III; (12) participation in boxing, M.G.L. ch. 147, §35; (13) sale or purchase of lottery tickets, M.G.L. ch. 10, §§24, 29.

Federal law also incorporates age as a qualification for many purposes. For example: (1) employment, 5 U.S.C. §§2105, 3307; (2) selection for military service, App. 50 U.S.C. §§453, 454; (3) naturalization by petition, 8 U.S.C. §1445; (4) programs for youth — job corps and youth conservation corps, 42 U.S.C. §2713; 16 U.S.C. §1702; (5) sale of firearms, 18 U.S.C. §22(b)(1); (6) old age insurance benefits, 42 U.S.C. §402(a)(2); (7) increased sentences for special dangerous offenders, 18 U.S.C. §3575.

> holding would subject every exercise of legislative line-drawing to judicial revision if in fact individualized determinations could be made, particularly where the results of those determinations would show that the line drawn did not result in the perfect classification of every affected individual." (Brief for Appellant at 42-43.)

An examination of the facts of the case and the lower court's careful reasoning shows that the court's decision is not a broad attack on legislative classification based upon age, mandatory retirement laws, or any other legitimate legislative line-drawing activity; nor does the lower court's reference to the *LaFleur* decision indicate that it was relying upon the irrebuttable presumption doctrine as the basis for its decision. Despite appellants' statements to the contrary, the lower court does not employ the irrebuttable presumption doctrine as an engine for the destruction of mandatory retirement statutes. *See Weinberger v. Salfi*, 43 U.S.L.W. 4985, 4992 (U.S. June 26, 1975).

The court below was careful to note that its decision declaring Mass. Gen. Laws ch. 32, §26(3) unconstitutional and void does not represent a judicial rejection of age-based classifications or of the legislative power to create such classifications. The court specifically noted examples of instances where legislative line-drawing is appropriate and constitutionally beyond dispute.

> "We fully accept the necessity of choosing arbitrary standards in certain and indeed in many

situations. For example, in dealing with the immeasurable changes relating to the onset of maturity, legislatures may require a specific age for voting, Oregon v. Mitchell, 1970, 400 U.S. 112, 91 S.Ct. 260, 27 L.Ed.2d 272, even though the particular age selected may seem indifferentiable from other ages in proximity to it. *Id.* at 294 (Stewart, J., concurring in part and dissenting in part); *see id.* at 243-246 (Brennan, White and Marshall, JJ. concurring in part and dissenting in part). *See also, e.g.,* United States v. Duncan, 9 Cir., 1972, 456 F.2d 1401, 1405 (minimum age for jury service), vacated on other grounds, 409 U.S. 814, 93 S. Ct. 161, 34 L.Ed.2d 72; Smith v. United States, 9 Cir., 1970, 424 F.2d 267 (selective service age limitations); Scarangella v. Commissioner of Internal Revenue, 3 Cir., 1969, 418 F.2d 228 (classification of tax exemptions by age of dependent)." 376 F. Supp. at 755.

It was because the peculiar factual circumstances surrounding the application of this particular statute, when viewed in the light of the rational basis test, showed that, in this instance, such a classification not only failed to serve the statutory purpose; it actually frustrated it. As a result, the court found that the statute did not survive constitutional scrutiny. 375 F. Supp. at 756. The distinguishing feature of this case as compared to other situations where age-based classifications are applied is that the group subject to the statutory classification had already been prescreened and preclassified for precisely the

purpose which the statute sought to achieve. It was the fact of prescreening and preclassification which the court found made the statutory classification irrational.

The appellants' position in both the court below and in this Court, is that once the validity of the statutory purpose is recognized, and the need for some sort of classification is accepted, the actual legislative determination setting that classification should not be questioned. The appellants argue in their brief that once it is conceded that (a) there is a general relationship between aging and decreased physical ability and (b) that the duties of state police may justify an early mandatory retirement age, then " . . . the existence of these two elements alone satisfied whatever burden they bore to demonstrate the rationality of the legislative determination, and required the district court to uphold the constitutionality of the challenged statute." (Brief for Appellant at 46).

The district court did not agree that its duty to review this statute was so narrowly circumscribed. It insisted that the legislative classification must bear some rational relationship to the purposes of the statute. The court said:

> "But to say that a line may be drawn arbitrarily when there is no readily discernible breaking, or turning, point, does not mean that the line can be drawn anywhere at all. To satisfy minimal standards of rationality the line must be drawn within a range where fairness, or some appreciable state interest, exists, even if no specific point within that range is preferable to any other." 376 F. Supp. at 755.

In insisting that the actual classification bear a rational relation to the purpose of the statute, the lower court was correct. *Ortwein v. Schwab*, 410 U.S. 656, 660 (1973). *See McLaughlin v. Florida*, 379 U.S. 184, 191 (1964). The appellants then argue that " . . . the record of this case supports a finding that retirement of Uniformed State Police officers at age 50 is a rational choice well within the bounds of legislative discretion" (Brief for Appellant at 46). To the contrary, the record supports the lower court's finding that the operation of the classification is irrational and frustrates the purpose of the statute.

The Commonwealth concedes that the operation of its classification " . . . involves the inevitable loss of individual public employees who remain willing and able to work beyond the prescribed retirement age" (Brief for Appellant at 19). If, as the lower court found, the operation of the classification resulted in the loss, not of an occasional individual who is fit and willing to continue, but of all such individuals, then its operation is irrational. A state has no interest in the operation of a legislative classification which achieves results which it does not desire. *See Bell v. Burson*, 402 U.S. 535, 540 (1970).

The record below reveals the existence of an elaborate medical screening system uniformly applied to every officer in the Uniformed Branch throughout his career. This medical screening system is established by regulation under the statute creating the Massachusetts State Police (A193-256). All initial applicants must be found physically qualified to become state police officers. This is done by submitting the applicant to an enlistment physical examination (A146). This examination is based upon the examination used by the United States Army to

determine enlistment fitness (A130). If an applicant is not found fit, he is not offered enlistment (A128-129). The initial enlistment term is for two years (F12). Thereafter, if the officer wishes to reenlist, he must submit himself to a reenlistment physical examination (F13). This is the same examination as the enlistment examination (F23). If a member is found unfit under the reenlistment physical examination. he must obtain a waiver to continue his service or be mandatorily retired.[5] Beginning at age 40 and continuing every year thereafter until the officer is retired, he is given the same physical examination on an annual basis with the added requirements of an electrocardiogram and tests for gastro-intestinal bleeding (A148). As in the case of the candidate for reenlistment, an over-40 officer found unfit must obtain a waiver to continue in service, or be mandatorily retired (A160).

The purpose of this scheme is to eliminate from service state police officers who have been found unfit to perform their duties. An officer who passes the physical examination has been determined by the Massachusetts State Police to possess all of the physical requirements needed to meet the physical demands of his job. Thus, the physical examination provides the criterion for continued service. The Commonwealth has admitted that:

> "To qualify to perform the duties of the Uniformed Branch of the Massachusetts State Police a member must be found physically fit. *When a member passes his re-enlistment or annual physical he is found to be qualified to*

5. Waivers are issued at the discretion of the Commissioner of Public Safety. At the time that this case was brought approximately 12 men out of a force of 880 continued to serve on waivers (A160).

> *perform all of the duties of the Uniformed Branch of the Massachusetts State Police"* (F55) (emphasis added).

The Commonwealth further admitted that:

> "A member's physical condition as it relates to his ability to perform the duties of the Uniformed Branch is determined at annual and/or re-enlistment physical examinations; *members who pass the physical examinations are determined able to perform the duties of the Uniformed Branch"* (F60) (emphasis added).

Because this classification continues to be applied to the officer throughout his career in the Uniformed Branch, it means that in order to continue to serve he must continue to meet the fitness standards. If the officer does not, he must face mandatory retirement or obtain the rarely granted waiver to continue on limited duty. The result of this intensive and continuous medical screening is to produce a group which is at all times wholly fit to perform all of the duties of the Massachusetts State Police.

The Commonwealth does not question the effectiveness of its medical screening process to produce a fit membership. *Compare Hodgson v. Greyhound Lines, Inc.*, 499 F.2d 859, 863-864 (7th Cir. 1974), *cert. denied,* 419 U.S. 1122 (1975). Nor does it dispute the necessary conclusion that an officer who is age 50 and is serving on full duty is fully fit. *See, e.g., Weisbrod v. Lynn,* 383 F. Supp. 933 (D.D.C. 1974), *aff'd.*, 420 U.S. 940 (1975); *McIlvaine v. Pennsylvania,* 6 Cmwlth. 505, 295

A.2d 630 (1972), *aff'd.*, 454 Pa. 129, 309 A.2d 801 (1973), *appeal dismissed,* 415 U.S. 986 (1974); *Weiss v. Walsh,* 324 F. Supp. 75 (S.D.N.Y. 1971), *aff'd.*, 411 F.2d 846 (2d Cir. 1972). It is at this point, however, that the statutory classification which is the subject of this case comes into play. It operates to retire on the grounds of superannuation the officer who is admittedly fit. The Commonwealth has stated that this is the effect of the application of the statutory classification:

> "Members who pass the physical examinations and are fully qualified to continue in service must retire if they are fifty years of age and have twenty years of service" (F63).

Given these undisputed facts, the question before the district court, then, was whether there was a rational basis for a statutory classification established for the purpose of eliminating superannuated officers, which operated in practice to eliminate only members who had been prescreened and were admittedly fit. It is this fact of intensive prescreening of the employees to isolate and dismiss the unfit which distinguishes this case from the usual situation where there is no such prescreening.

The appellants have suggested that the only evidence which the appellee introduced " . . . related to his own generally healthy condition " (Brief for Appellant at 4). It is true that appellee was found fully qualified to continue his duties as a member of the Uniformed Branch of the Massachusetts State Police (F78).

But to suggest, as appellants do (Brief for Appellant at 47), that this is merely an isolated instance where the classification

does not fit the facts, is to deny the existence of the actual operation of the classification. The fact of the matter is that not only the appellee, but every single member of the Uniformed Branch who is serving in full duty status at age 50, had to have been determined to be fully " . . . qualified to perform all of the duties of the Uniformed Branch of the Massachusetts State Police" (F55).

The issue before the district court, therefore, pertained not to a statutory classification which misclassified a single individual or even a minority which might have been included. It was not a situation where the line drawn ". . . leaves out some who might well have been included." *Village of Belle Terre v. Boraas*, 416 U.S. 1, 8 (1974). Rather, the operation of the statutory classification upon the membership, which already had been thoroughly screened from the outset of their service and classified so as to remove the unfit, is such that the statutory classification operates only to retire for superannuation those members who are fit.

C. No Rational Purpose Could Be Assigned To The Operation Of The Classification Based Upon The Legislative History, Medical Data Or Other Evidence In The Record.

The court below was not satisfied to conclude its search for rationality at this point. It felt that there may have been a rational basis for the statute despite its effect of retiring fit individuals. 376 F. Supp. at 755. The court then looked to the question of the predictive validity of the existing medical screening system, questioning its reliability for a person of age 50. *Id.* The court put it this way:

> "We must look therefore, in another direction for reasonableness — is there, for example, a greater risk at the higher age that the test, or, more exactly, the prognosis based upon testing, will be less reliable?" 376 F. Supp. at 755.

The record suggested no basis upon which it could be determined that the prognosis based upon testing became less reliable at age 50.[6]

The district court took note of the comprehensive study by the Federal Aeronautics Administration that led to its establishment of age 60 for the mandatory retirement of commercial pilots. *Air Line Pilots Association International v. Quesada*, 276 F.2d 892 (2d Cir. 1960), *cert. denied*, 366 U.S. 962 (1962). The study in that case indicated that the predictive validity of examinations relating to heart attacks and strokes did not diminish until about age 60. 276 F.2d at 898.

In its brief for this Court the appellants have recited extensively from the legislative history of the challenged statute and from the legislative history of the entire legislative scheme of which the statute is a part. Appellants state the ". . . history and context of this legislative determination establish its rationality."

6. Dr. Dawber testified that the predictive validity of examinations did not decrease (A87). The Surgeon General said that he had no evidence on which to make such a judgment (A176). He conceded, however, that some men over 50 were capable of performing the duties of the Uniformed Branch (A173). The statistics which the Commonwealth produced suggested that there would be no reduction in the predictive validity of the examination. 376 F. Supp. at 756 n.7.

(Brief for Appellant at 45). It is appellee's position that this legislative history lends no support to the age classification.[7]

Although the state police had existed in Massachusetts from 1865,[8] the first retirement statute pertaining to the state police was enacted in 1911 and provided for retirement only in the case of incapacity after 20 years service. Act of July 14, 1911, ch. 675 [1911] Mass. Acts and Resolves 800.[9]

The mandatory retirement age of 50 makes its first appearance in the Act of August 12, 1939, ch. 503, §3 [1939]

7. In its brief at page 24, the Commonwealth set out a quotation from a Special Commission Report to the Legislature in 1937 as evidence of a "widely accepted premise [of] the necessity for younger men to perform the job." The legislation under study by the Special Commission would have permitted the Commissioner of Public Safety to selectively retire officers who had become incapacitated for further service beginning at age 45. The Commission rejected the proposed legislation because of its cost and added the observation that the state police logically should be included with other state or local employees who perform hazardous duties in Group I. The Group I retirement age was 65 (Mass. H. Doc. No. 1582 at 9-13 [1938]).

8. Act of May 16, 1965, ch. 2349 [1865] Mass. Acts and Resolves 631.

9. Mass. Acts and Resolves 800, Section 1 provides as follows:

> "Any member of the district police, who in the judgment of the governor, is disabled for useful service in that department, and who is certified by a physician, designated by the governor, to be permanently incapacitated either physically or mentally, by injuries sustained through no fault of his own, in the actual performance of his duty, for the further performance of his duty in the department, and any member of the said department who has performed faithful service for the commonwealth for not less than twenty years, and is in the judgment of the governor incapacitated for further service as a member of the said department, shall, if he so requests, be retired, and shall annually receive a pension equal to one half of the compensation received by him at the time of his retirement."

Mass. Acts and Resolves 737. There is no legislative history as to the basis for the selection of this age for mandatory retirement rather than the ages of 65 and 70 which had been used and which continues to be used at present.[10] The use of this age for

10. The Commonwealth correctly suggests that the impetus for the 1939 legislation may have come from the proposal of the Commissioner of Public Safety in 1937 to create a separate retirement fund for state police officers (Brief for Appellant at 31). The Commonwealth is in error, however, in asserting that this proposed legislation called for " . . . a mandatory retirement age of 45." *Id.* The legislation did not require mandatory retirement for members at age 45, but provided the Commissioner with the power to selectively retire members who became permanently incapacitated at and after age 45. The proposal provided:

> "Any member of the division of state police of the department of public safety appointed thereto under the provisions of section nine A of chapter twenty-two, who has performed faithful service therein and who in the judgment of a rating board consisting of the surgeon-general of the commonwealth, the commissioner of public safety, or such members of their respective departments as may be designated by them, is permanently incapacitated for active service by reason of injuries sustained or illness incurred through no fault of his own in the actual performance of duty, shall be retired and shall annually receive a pension from the commonwealth equal to not less than one half nor more than three fourths of the compensation including maintenance allowance paid to him at the time of his retirement, the amount of said pension within the stated limits to be determined by the said rating board and the comptroller; and any member so appointed who has performed faithful service in the said division for not less than twenty years and who has attained the age of forty-five, and who in the judgment of the commissioner is incapacitated for further service in the division, may be retired, and shall annually receive a pension from the commonwealth equal to one half of the average compensation including maintenance allowance paid to him during the last three years of his service. Any member of the said division appointed under the said section nine A who is a veteran as defined in section fifty-six may upon notice seasonably given elect to receive the benefits of the provisions of this chapter which relate to the retirement of veterans.

As such, the proposed legislation operates much like the present disability retirement statute, M.G.L. ch. 32, §26(2).

mandatory retirement does not appear anywhere else in Massachusetts legislation. The police and firemen of the cities and towns of the Commonwealth are mandatorily retired at age 65.[11] The age 50 retirement provision has found little subsequent support.[12] Whatever historical basis which supported the initial classification may no longer exist.[13]

11. "No permanent member of said department shall remain in service after he has attained the age of sixty-five." Mass. Gen. Laws ch. 32, §§81A(d), 83A(d).

12. A special commission reported to the legislature in 1953:

> "The Commission has been disturbed by a trend in recent years to the premature retirement of public employees. There has been a tendency for public employees, who have fulfilled the minimum requirements under the law, to retire at an early age, while in good physical condition . . . . The Commission feels every effort should be made to retain in the public service all physically fit and mentally alert employees until they reach the age of sixty, at least. The early retirement of public employees has not only deprived the system in which they have been engaged of valuable service, but also has proven to be an expensive luxury." Mass. H. Doc. No. 2737, at 11-12 (1953).

A special commmission to study and revise the laws relative to retirement in 1955 reported:

> "It is believed that a different treatment between Groups A, B and C, as to normal retirement age, is proper because of differences in occupational requirements. Ages 65 and 60 appear to be proper for Groups A and B, respectively, and, although some arguments for raising the normal retirement age above 50 for uniformed members of Group C appear to have merit, it was felt that a continuation for them of age 50 for the present might be justifiable. However, it is recommended that the normal retirement age for Group C be reviewed in the future . . . . The present provisions appear to be reasonable, except that, as in the case of normal retirement age, there might be some argument for raising age 50 for Group C, particularly since there is no variation for that group between normal retirement age and compulsory retirement age. It is believed that basically, employees should be allowed to continue in

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Like the Court in *Quesada*, the lower court also looked to the mandatory retirement ages for state police established by other jurisdictions in order to find possible support for the age of 50 established in the Massachusetts statute. 376 F. Supp. at 756. Here again, there was no basis for the retirement age. Unlike the facts in *Quesada*, which supported mandatory retirement ages for pilots at age 60, 276 F.2d at 898, the record showed that no other state retired its state police at age 50. The earliest mandatory retirement age used by other states and the federal government was age 55.[14]

(Cont'd)

> employment as long as they are able to properly carry out the duties of their occupation. It is in the interest of the economy of the country as a whole to have persons employed rather than unemployed." Mass. H. Doc. No. 2500, at 24-25 (1955).

13. On January 18, 1973 Richard E. McLaughlin, the Secretary of the newly created Executive Office of Public Safety, submitted his report pertaining to the reorganization of the various departments placed under his jurisdiction. Among these was the Massachusetts State Police, for which he proposed the following:

> "The mandatory retirement age of the state police will be increased from age 50 to 55. This will enable the Police and Security Administration to utilize the services of trained experienced police officers longer. The present retirement age of state police was established in 1919 when officers rode horses and motorcycles on predominately unpaved roads. These conditions no longer exist, thus we need no longer be bound by the present retirement age.
>
> This will result in savings to the taxpayer of $120,000 the first year. This savings will multiply each year so that in five years a total of $1,185,000 savings will result." (Plan for Reorganization at 2-3).

14.

Alabama:	60 years, Code of Alabama recompiled, Title 55, §460(d).
Alaska:	55 years, Alaska Statutes, Title 39, §39.55.680(11).
Arizona:	65 years, Arizona Revised Statutes Annotated, Title 38, §781.01.
Arkansas:	65 years, Arkansas Statutes Annotated, Title 42, §455C.

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D. The Commonwealth's Interest In Providing Financial Security For Its Retired Employees Is Not Altered By The Holding Of The District Court.

The Commonwealth, in its brief to this Court, has suggested that there is an auxiliary purpose to the challenged statute which is the provision of financial security for public employees who

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California:	60 years, Deering's Califo.nia Codes Annotated, Art. 2 §20980.
Colorado:	65 years, Colorado Revised Statutes, Article 6, §24-50-204.
Connecticut:	70 years, Connecticut Statutes Annotated, Title 5, ch. 66, §5-162.
Delaware:	55 years, Delaware Code Annotated, Title 11, §8323.
Florida:	65 years, Florida Statutes Annotated,Chapter 13, §321.18
Georgia:	No age, Georgia Code Annotated, Title 92A, §§217, 218 repealed by Acts of 1949, p. 70.
Hawaii:	70 years, Hawaii Revised Statutes, Title 7, ch. 88, §88-63.
Idaho:	60 years, Idaho Code, Chapter 11, §59-1310(1).
Illinois:	60 years, Illinois Annotated Statutes, Chapter 121, §307.12-1.
Indiana:	70 years, Burn's Indiana Statutes Annotated (Code Edition), Title 10, §10-1-2-1.
Iowa:	65 years, Iowa Code Annotated, Chapter 6, §97A-6(1, b).
Kansas:	60 years, Kansas Statutes Annotated, Article 21, §§74-4971, 4975.
Kentucky:	55 years, Kentucky Revised Statutes, Title 16, §16.505(15).
Louisiana:	65 years, L.S.A. Revised Statutes, Title 23, §40:1426-1.
Maine:	25 years service, Maine Revised Statutes Annotated, Title 5, §1121(c).
Maryland:	64 years, Annotated Code of Maryland, Article 88B, §53(c).
Michigan:	56 years, Michigan Compiled Laws Annotated, Chapter 28, §105.
Minnesota:	No age, Minnesota Statutes Annotated, Chapter 352B, §352B.20.
Mississippi	60 years, Mississippi Code Annotated, Title 20, ch. 2, §8090-56.
Missouri:	55 years, Missouri Revised Statutes, Title VIII, §104.080.
Montana:	60 years, Montana Revised Statutes, Title 31, §216.
Nebraska:	60 years, Revised Statutes of Nebraska, Chapter 60, §452.
Nevada:	55 years and 30 years service, Nevada Revised Statutes, Chapter 169, §125.
New Hampshire:	65 years, New Hampshire Revised Statutes Annotated, Chapter 103, §12.

(Cont'd)

are retired. In describing the statute, the appellants have noted its dual objectives as follows:

> "Massachusetts like all other states and the federal government, has pursued two objectives: maintenance of an effective public labor force

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New Jersey:	55 years and 25 years service, New Jersey Statutes Annotated, Title 53, §5A-8.
New Mexico:	61 years, New Mexico Statutes Annotated, Chapter 39, §2-6(B).
New York:	62 years, McKinney's Consolidated Laws of New York Annotated, Volume 18, §228.
North Carolina:	65 years, General Statutes of North Carolina, Chapter 135, §14.
North Dakota:	60 years, North Dakota Century Code Annotated, Title 39, §03A.18.
Ohio:	55 years, Ohio Revised Code and Service Annotated, Title 55, §5505.16.
Oklahoma:	55 years, Oklahoma Statutes Annotated, Title 47, §2-305(a).
Oregon:	60 years, Oregon Revised Statutes, Chapter 71, §65(d).
Pennsylvania:	60 years, Pennsylvania Statutes Annotated, Title 17, §1725-102(14).
Rhode Island:	60 years, General Laws of Rhode Island, Title 42, §28-22.
South Carolina:	70 years, Code of Laws of South Carolina, Title 61, §61-103(2).
South Dakota:	55 years, South Dakota Compiled Laws Annotated, Title 3, §3-12-47(35).
Tennessee:	60 years, Tennessee Code Annotated, Chapter 39, §8-3905(b).
Texas:	65 years, Vernon's Civil Statutes of the State of Texas Annotated, Title 109, Art. 6228a, §5.A.
Utah:	55 years, Utah Code Annotated, Title 49, §49-11-9(35).
Vermont:	65 years, Vermont Statutes Annotated, Title 3, §455(13)(2).
Virginia:	65 years, Code of Virginia, Title 51, §51-150.
Washington:	60 years, Revised Code of Washington, Title 43, §43.250(1).
West Virginia:	55 years, West Virginia Code, Chapter 15, Article 2, §15-2-28.
Wisconsin:	55 years, Wisconsin Statutes Annotated, Title VI-A, §§41:02(23), 42.11.
Wyoming:	65 years, Wyoming Statutes, Title 31, §31-11.7(d).
Federal Law Enforcement and Firefighter Personnel:	55 years or 20 years service, whichever comes later, 5 U.S.C. §8335(g).

and provision of financial security for those who have served the state as public employees" (Brief for Appellant at 12).

The Commonwealth did not suggest in the court below that this auxiliary purpose of providing for the financial security of retired employees would lend rational support to the statutory classification which operated to retire at age 50 state police officers who had been found fit to continue employment. It does not appear to make the suggestion here.

This auxiliary purpose is significant, however, because it reveals the financial interest of the state in managing its pension system. Where state economic regulation is involved, judicial deference is accorded the legislative classification especially where the state is attempting to distribute its fixed revenues among competing interests. *Dandridge v. Williams,* 397 U.S. 471, 485-486 (1970). The elements of economic regulation in this case give added support to the lower court's selection of the rational basis test as the test for measuring this legislation. The state has a legitimate interest in protecting itself from increased expenses. *See Vlandis v. Kline,* 412 U.S. 441, 445 (1973). It also has a legitimate interest in making its programs self-sustaining where possible. *Geduldig v. Aiello,* 417 U.S. 484, 496 (1974).

The appellants do not suggest, however, that as a result of the lower court's decision any greater financial obligations will be placed on the state's retirement system. *See Jemenez v. Weinberger, supra,* at 633. Indeed, the opposite effect may result. Under the court's decision, able-bodied officers would

continue to make contributions into the fund, rather than being mandatorily retired and drawing out pension benefits.[15]

Even if this were not the result, the lower court's decision cannot in any way bind the legislature to make increased payments. Under Massachusetts law, a change in the mandatory retirement age does not give rise to a legal obligation for increased retirement benefits. *McCarthy v. Sheriff of Suffolk County,* 322 N.E. 2d. 758 (Mass. 1975). In that case the Supreme Judicial Court of Massachusetts held that the legislature has broad powers to regulate, enlarge, limit or terminate the duties or tenure of state officers as public emergency or policy may require. *Id.* at 761. Such legislative action may be freely taken provided only that the level of benefits originally promised a person entering the employment of the Commonwealth are preserved in substance and not modified downward. *Id.* at 762.

It appears, therefore, that the state's financial stake in the decision of the lower court is minimal and to the extent that it exists, the state is able to protect itself from any increased financial burden.

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15. Since the date of the lower court's decision, Lieutenant Lawrence Carter, Captain Raymond M. McGuire and Captain William F. Ready have obtained restraining orders to remain on the job. *Carter v. Commonwealth,* Civil No. 74-487 (Plymouth Sup. Ct., Oct., 1974); *McGuire v. Commonwealth,* Civil No. 1330 (Bristol Sup. Ct., March 21, 1975); *Ready v. Commonwealth,* Civil No. 758 (Bristol Sup. Ct., Dec. 5, 1974).

II.

THE DISTRICT COURT DID NOT USE THE IRREBUTTABLE PRESUMPTION DOCTRINE IN HOLDING THAT MASS. GEN. LAWS CH. 32, §26(3)(a) VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT.

In the last paragraph of its opinion, the lower court made the following reference to this Court's opinion in *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974):

> "On this record we find that mandatory retirement at age 50, where individualized medical screening is not only available but already required, is no more rational, and no more related to a protectable state interest, than the mandatory suspension or discharge of school teachers upon reaching their fourth or fifth month of pregnancy." 376 F. Supp. at 756.

The appellants claim that the lower court has erroneously applied the irrebuttable presumption doctrine to the facts in this case. The appellants assert that:

> "The irrebuttable presumption doctrine has no place in assessing the constitutional validity of the Massachusetts Mandatory Retirement Age for Uniformed State Police." (Brief for Appellant at 33).

The appellants present a lengthy analysis of this Court's recent opinions which have used the irrebuttable presumption doctrine, distinguishing the cases from the one now before this Court. (Brief for Appellants at 34). Whether the irrebuttable presumption doctrine is appropriate for the decision of this case is not in issue because the district court did not employ that doctrine in its analysis.

Together with the equal protection claim, the appellee raised the issue of denial of due process of law in the lower court and, relying upon this Court's decision in *Cleveland Board of Education v. LaFleur, supra,* asserted that the mandatory retirement statute created an irrebuttable presumption which should be invalidated.[16]

The district court rejected these contentions and never reached the due process issue. It relied exclusively upon the Equal Protection Clause. At the outset of its opinion the court announced that the single issue it would reach pertained to appellee's equal protection claim:

> "We reach only one issue, that a classification based on age 50 alone lacks a rational basis in furthering any substantial state interest." 376 F. Supp. at 754.

Later the court addressed itself to the type of scrutiny it would apply under the equal protection analysis in the following terms:

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16. (R. Amended Complaint at 5.)

> "Our first question could be the standard to apply in testing the constitutionality of the statute; whether because the plaintiff's right to employment may be a fundamental interest or because there might be a suspect classification, the burden is on the state to show a compelline interest, or whether, on the other hand, the burden is on the plaintiff to show a lack of rational basis." 376 F. Supp. at 754.

The court quoted from two cases which apply the rational basis standard:

> " . . . we find that mandatory retirement of officers at 50 years of age bears no fair and substantial relation to the object of the legislation, *F.S. Royster Guano Co. v. Virginia*, 1920, 353 U.S. 412, 415, 40 S. Ct. 560, 64 L.Ed. 989, quoted in *Reed v. Reed*, ... " 376 F. Supp. at 754.

Nowhere in its opinion does the lower court engage in any analysis of the irrebuttable presumption doctrine or application of that doctrine to the facts of the case. There is not any mention of the term irrebuttable presumption anywhere in the opinion. The court's refusal to apply the irrebuttable presumption doctrine appears to have been correct in light of *Weinberger v. Salfi*, 43 U.S.L.W. 4785, 4992 (U.S. June 26, 1975).

A. The District Court's Reference To Cleveland Board Of Education v. LaFleur Was Appropriate.

The lower court cited the *LaFleur* decision not for the purpose of invoking the irrebuttable presumption doctrine, but rather for the reason that this Court's discussion of the operation of mandatory discharge statutes was relevant to the issues in the present case.

Appellants concede the factual similarity between the cases as to the operation of the statute. (Brief for Appellants at 39). In both cases the subject statute set arbitrary cutoff dates for being terminated from public employment regardless of individual capacity. In both the cases the state had undisputedly legitimate state interests in regulating the supply of its services, whether it was in eduction, as in the case of *La Fleur*, or police services, as in the present case. In both cases a justification for the rule was the state's legitimate interest in maintaining the physical fitness and capability of its employees.[17] 414 U.S. at 643; 376 F. Supp. at 754. In *LaFleur*, as in this case, the medical evidence showed that " . . . the ability of any particular [individual] to continue at work past any fixed time . . . is very much an individual matter." 414 U.S. at 645. The opinion of the majority in *LaFleur* held that the challenged

17. In both cases there also appears to have been elements of "outmoded taboos" in the original drawing of the rules. In *LaFleur*, the taboos pertained to pregnancy. In the present case the taboos pertain to misconceptions about age. The scant legislative history suggests that rather than relying on any specific scientific or factual data the legislature adhered to a common misconception that men at age fifty are too old to perform the duties of a state police officer. *Cf. Some Irrational Beliefs About Retirement in the United States, Indus. Gerontology* 23 (1974); Quirk and Skinner, *ICHS: Physical Capacity, Age and Employment*, 19 *Indus. Gerontology* 49 (1973).

rules could not pass muster under the Due Process Clause of the Fourteenth Amendment, but in so holding noted that the rules were "wholly arbitrary and irrational" and "serve[d] no legitimate state interest . . . . " *Id.* at 650. These terms are often used by this Court in an equal protection context. The rules under review in *LaFleur* and the statute under review in this case are similar in many respects. The lower court could properly conclude that regulations which have such serious shortcomings under the Due Process Clause might have similar shortcomings under the Equal Protection Clause. Further, Justice Powell in his concurring opinion noted the propriety of an equal protection analysis to the facts in *LaFleur*. *Id.* at 651.

In *LaFleur*, this Court concluded that because of the infringement upon the fundamental right of procreation by the mandatory leave regulation, the school board was required to adopt a less sweeping regulation incorporating some measure of individualized testing. This Court said:

> "The Fourteenth Amendment requires the school boards to employ alternative administrative means, which do not so broadly infringe upon basic constitutional liberty in support of their legitimate goals." *Id.* at 647.

The appellants have warned that the lower court's reference to *LaFleur* may cause the extension of the opinion to require individualized testing in every instance of legislative line-drawing. (Brief for Appellants at 43). In contrast to this Court's opinion in *LaFleur*, however, the district court did not require the retirement board to institute individualized testing, nor did it

require the retirement board to alter the existing administrative procedures. The opinion required only that the legislative line-drawing be responsive to administrative determinations that were already the order of the day. 376 F. Supp. at 756.

Support for the district court's decision in this regard is set out in Part III of this Court's decision in *LaFleur*. 414 U.S. at 648. That section dealt not with the mandatory leave provision, but with the rules regulating eligibility to return to work. The Court decided that the regulations contained constitutionally acceptable medical and next-semester eligibility provisions. *Id.* at 648, 649. In one instance, however, the Court found that the regulations required the mother to wait until her child reached the age of three months before the return rules began to operate. *Id.* at 648.

In attempting to discover a reasonable justification for this supplemental limitation, the Court suggested that teachers fitness may have been the basis. It noted, however, that such a purpose suffered from " . . . the same constitutional deficiencies that plague the irrebuttable presumption in the termination rules." *Id.* at 649. The Court added that the application of the presumption was "patently unnecessary" because the state's interest in having a fit teacher was already fully protected by the requirement that she obtain a physician's certificate or medical examination. *Id.* The Court concluded that the statute, insofar as it embodied the three-month age provision, was wholly arbitrary and irrational and that the age limitation served no legitimate state interest. *Id.* at 650.

That conclusion is significant in the present case because of the Court's finding that the rule purporting to regulate the physi-

cal fitness of the employees was irrational, not because of the application of the irrebuttable presumption doctine, but, rather, because all relevant data regarding fitness was already available due to individualized tests. Given the medical data that the employee was fit, that portion of the rule which sought to establish fitness by some arbitrary standard, and in disregard of the existing data, could not withstand constitutional scrutiny. *Id.* at 649-650.

Precisely the same circumstance exists in this case. The state's interest in having fit state police officers is already fully protected by the administrative requirement that he annually be found fit to perform his duties. The district court could properly find that no additional protection could be added by the application of the mandatory retirement provision contained in Mass. Gen. Laws ch. 32, §26(3)(a).

III.

THE INTEREST OF APPELLEE IN RETAINING HIS EMPLOYMENT WITH THE MASSACHUSETTS STATE POLICE FAR OUTWEIGHS THE INTEREST OF THE COMMONWEALTH IN RETIRING HIM AT AGE 50.

A. Age-Based Classifications Suggest The Propriety Of A Level Of Judicial Scrutiny Which Weighs Or Compares The State Interest In Promoting The Classification With The Nature Of The Personal Rights Which The Classification Endangers.

This Court has suggested that the ultimate test of the validity of a statute under the Equal Protection Clause is a balancing of state interests and individual rights.

> "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose. *Morey v. Doud,* 354 U.S. 457 (1957); *Williamson v. Lee Optical Co.,* 348 U.S. 483 (1955); *Gulf, Colorado & Santa Fe R. Co. v. Ellis,* 165 U.S. 150 (1897); *Yick Wo v. Hopkins,* 118 U.S. 356 (1886). Though the latitude given state economic and social regulation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny. *Brown v. Board of Education,* 347 U.S. 483 (1954); *Harper v. Virginia Board of Elections,* 383 U.S. 663 (1966). The essential inquiry in all of the foregoing cases is, however, inevitably a dual one: What legitimate state interest does the classification promote? What fundamental personal rights might the classification endanger? *Weber v. Aetna Casualty & Surety Co., supra,* 406 U.S. at 172-173."

See Vlandis v. Kline, supra at 458-459 (White, J., concurring in judgment); *San Antonio Independent School District v. Rodriguez, supra* at 98-99 (Marshall, J., dissenting); *Gunther, supra,* 86 Harv. L. Rev. 1 (1972).

The state's interest in maintaining the arbitrary classification is small. The purposes of such a classification in

maintaining a fit and vigorous force are met by the physical examinations which permit the state to disqualify the unfit from continued service. Nor is the Commonwealth's continued operation of its state police force seriously disrupted by the lower court's decision. It is not required to institute any new administrative procedures or incur any additional financial burden. It retains the existing medical screening procedures to separate unfit members. Members may continue to voluntarily retire after 20 or more years service.[18] The legislature may reinstitute a mandatory retirement statute so long as it falls within the range of ages which have some rational relation to the purpose of the statute.[19] *See Stanton v. Stanton, supra.*

The district court said:

> "Whether we would reach the same result if the statute selected a more customary retirement age is not before us. With great respect to Mr. Justice Rehnquist, dissenting in *Cleveland Board of Education v. LaFleur,* ante, we would anticipate the question of mandatory retirement at age 70 not to be the same as at age 50, but perhaps we say this because of the increasing difficulties that a plaintiff might have to show that at that greater age the state had not made out a factually rational argument." 376 F. Supp. at 756 n.9.

18. Mass. Gen. Laws ch. 32, §28A.

19. The advisability of having a two-tiered retirement system to permit voluntary retirement at an earlier age and require mandatory retirement at a later age was noted in the Special Report of the Retirement Law Commission, Mass. H. Doc. No. 5900 (1973).

To be balanced against the interest in maintaining the classification are the interests of the individual. The court below did not adopt the appellee's claim that his right to continued employment was a fundamental right. The district court did find, however, that the appellee had a sufficient interest in maintaining his employment so that it could not be taken from him irrationally. 376 F. Supp. at 754.

B. Appellee Has A Protected Interest In His Continued Employment.

Appellants have argued that because Mass. Gen. Laws ch. 32, §26(3) was in effect when appellee joined the Massachusetts State Police in 1948 he had no expectancy for job continuity beyond age 50 and therefore he should be foreclosed from asserting his claim (Brief for Appellant at 40). Appellants rely upon this Court's opinion in *Board of Regents of State Colleges v. Roth,* 408 U.S. 564 (1972). Appellants' reliance on that case is misplaced. It involved the Due Process Clause of the Fourteenth Amendment and pertained to the point at which a person may claim his right to procedural due process.

The issue in this case does not pertain to the application of procedural due process rights. The district court did not use a due process analysis. Its analysis was under the Equal Protection Clause.

Further, even if it were held that appellee must show some protected interest in his continued employment in order to make his claim under the Equal Protection Clause, he has done so. This Court suggested in *Roth* that where denial of

reemployment involves interference with liberty or property there is a protectable interest under the Due Process Clause. *Roth, supra* at 571. Appellee was able to show that his denial of reemployment involved interference with his liberty and his property interests. This Court has said that there is an interference with liberty where the ". . .State, in declining to reemploy the respondent, imposed upon him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities." *Id.* at 573. In this case the appellee was denied reemployment as a police officer because of superannuation. Mass. Gen. Laws ch. 32, §26(3) (R. Letter of Board of Retirement to Robert D. Murgia). This is a characterization of the appellee as unfit and incapable of performing his job. Clearly, the opportunities for him to obtain reemployment in his chosen profession of police officer are severely limited. It is not likely that any police department will hire an individual for new employment when the state has characterized him as superannuated for state police work.

Appellee also has a claim of entitlement to his job. He was hired under Mass. Gen. Laws ch. 22, §9A. That statute provides that after six years of service he may not be denied the right to reenlistment, provided he passes the reenlistment physical examination. This he has done and therefore he has a claim of entitlement for continued employment under Section 9A.

There are, in addition, broader considerations which give substance to the appellee's claim in this case. Although his right to employment may not be one which is specifically defined in the Constitution so as to require classification as a fundamental right, *San Antonio, supra,* nevertheless, the right to employment

has its roots in the Constitution and is of vital importance to the individual. *See, e.g., Arnett v. Kennedy,* 416 U.S. 134 (1974); *Roe v. Wade,* 410 U.S. 113, 168 (1973) (Stewart, J., concurring); *San Antonio Independent School District v. Rodriguez, supra* at 31; *United States v. Robel,* 389 U.S. 258, 270 (1967); *Greene v. McElroy,* 360 U.S. 474, 492 (1959); *Schware v. Board of Bar Examiners of New Mexico,* 353 U.S. 232, 238-239 (1957); *Peters v. Hobby,* 349 U.S. 331, 352 (1954); *Meyer v. Nebraska,* 262 U.S. 390, 399 (1923); *Truax v. Raich,* 239 U.S. 33, 41 (1915); *Smith v. Texas,* 233 U.S. 630, 636 (1914); *Allgeyer v. Louisiana,* 165 U.S. 578, 589 (1897); *Dent v. West Virginia,* 129 U.S. 114, 121-122 (1888).

C. Classifications Based Upon Age Share Many Of The Characteristics of A Suspect Classification, Which Requires A Level Of Judicial Scrutiny Above That Usually Applied To A Review Of Legislation Regulating Economic And Social Matters.

The lower court also recognized the public interest in protecting individuals from classifications based on age discrimination. Arbitrary age-based classifications exhibit the characteristics which Justice Brennan described as appropriate for determining a classification to be suspect in *Frontiero v. Richardson,* 411 U.S. 677 (1973).[20]

20. ". . .[S]ince sex, like race and national origin, is an immutable characteristic *determined solely by the accident of birth,* the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility...' *Weber v. Aetna Casualty and Surety Co.,* 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and

(Cont'd)

Like sex, age is simply an accident of birth and, like sex, it frequently bears no relation to the ability to perform or contribute to society. Like distinctions based upon sex, distinctions based upon age are grounded in misconceptions which have come to pervade the statute books and have the effect of relegating the class, the aged, to an inferior legal status regardless of individual ability. *See Frontiero v. Richardson, supra* at 684-687. This similarity suggests the propriety of according age-based classifications the same scrutiny accorded gender-based classifications. *See Stanton v. Stanton,* 95 S. Ct. 1373 (1975).

The effects upon a person who is subject to a classification based upon age, which takes from him his employment at age 50 when he is otherwise fully qualified to continue, have been documented and are beyond dispute. A long series of diverse studies has been undertaken, and all the studies have reached surprisingly similar conclusions.[21]

(Cont'd)

aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status *without regard to the actual capabilities* of its individual members." *Id.* at 686-687 (emphasis added).

21. *See generally* 1971 White House Conference on Aging, Section Recommendations on Employment and Retirement, U.S. Dept. of Labor, Research Materials Accompanying Report to the Congress on Age Discrimination in Employment under Section 715 of the Civil Rights Act of 1964 (1965); Institute of Labor and Industrial Relations, *Too Old to Work — Too Young to Retire: A Case Study of a Permanent Plant Shutdown,* prepared for the Senate Special Committee on Unemployment Problems, 86th Cong. 1st Sess. (1959). The Governors Special Planning Commission on Elderly Affairs, *A Profile of*

(Cont'd)

Inevitably, the conclusions arrived at show that the employee who is age 40 or older and is displaced from his job is faced with severe economic and psychological stresses. He is not a desirable employee for new employment since most employers prefer to hire younger persons.[22] He may remain unemployed for months or years. Pensions, benefits and other substitute sources of income are not adequate to maintain his living standard.[23]

Often more than mere personal or family finances are involved. The employee's very physical and psychological well being may be adversely affected. The over-forty unemployed person is likely to become apathetic and demoralized or develop a self-deprecating attitude.[24]

(Cont'd)

Massachusetts Elderly (1971); A Report of the Special Committee on Aging, United States Senate, *Developments in Aging: 1971 and January-March 1972,* S. Rep. No. 92-784 92nd Cong. 2d Sess. (XXII) (1972) (hereinafter "Developments in Aging"); Note, *Age Discrimination in Employment: The Problem of the Older Worker,* 41 N.Y.U. L. Rev. 383 (1966).

22. *See* Developments in Aging at 48; Research Materials at 89-90.

23. *See* Hearings Before the Subcommittee on Employment and Retirement of the Special Committee on Aging, United States Senate, 92nd Cong. 1st Sess. pt. 4 (1971) (hereinafter "Employment and Retirement"); *Economics of Aging: Towards a Full Share in Abundance — Facts and Findings,* The Task Force Report Brief, 115 Cong. Dec. 230 (1969).

24. *See* Employment and Retirement, *supra* at 241; Profile *supra* at 8. *See generally,* Note, *Too Old to Work: The Constitutionality of Mandatory Retirement Plans,* 44 So. Cal. L. Rev. 150 (1972).

D. The Legislative Response To The Problem Of Age-based Discrimination In Employment Indicates A Clear Statement Of Public Policy Against Mandatory Retirement At Age 50 Which Should Be Given Judicial Deference.

Congress has recognized these facts and the adverse effect they have on commerce and has made their continuation violative of the law.[25] In the statement of findings and purpose of the age discrimination in Employment Act of 1967, Congress succinctly summarized the problems of the displaced older worker when it found:

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long term unemployment with resultant deterioration of skill, morale and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave.

The act was amended by Pub. L. 93-259, effective May 1, 1974, to expand the definition of employer to include "a State of

25. Age Discrimination in Employment Act of 1967, 81 Stat. 602; 29 U.S.C. §§621-634 (1967).

political subdivision of a State and any agency or instrumentality of a State or political subdivision of a State . . . ." The effect of this amendment is to extend the coverage of the act to cases like the present one.

The Older Americans Act of 1965 declares it to be the joint and several duty of the governments of the United States and of the several states and their political subdivisions to assist older people to secure equal opportunity for employment with no discriminatory personnel practices because of age.[26]

Government contractors are subject to Executive Order No. 11141, which prohibits discrimination based upon age.[27] Governmental agencies are under specific instructions from the President to eliminate age discrimination in the Federal Government.[28] Approximately 30 states have specific legislation forbidding discrimination based upon age, including Massachusetts.[29]

26. 79 Stat. 219, 42 U.S.C. §3001 (1965).

27. Executive Order No. 11141 was signed February 12, 1964 and appears in the Code of Federal Regulations at 3 C.F.R. 179.

28. *See* Memorandum for Heads of Departments and Agencies dated September 13, 1972. (R. Plaintiff's Trial Brief Appendix B).

29.

Alaska:	Alaska Statutes, Title 18, §§18.80.010 to 18.80.300.
California:	Deering's California Code Annotated, Article 14, §§1410-1433.
Connecticut:	Connecticut General Statutes Annotated, ch. 563, §§31-122 to 31-128.
Delaware:	Delaware Code Annotated, Title 19, ch. 7, Subchapter II, §§710-718.

(Cont'd)

The Massachusetts policy against discrimination based upon age is extremely clear and well defined. The Massachusetts statutory scheme as set forth in Mass. Gen. Laws ch. 149

(Cont'd)

District of Columbia:	District of Columbia Commission on Human Rights, Commissioner's Order No. 72-224 (July 8, 1971).
Georgia:	Georgia Code Annotated, *as amended by* H.B. 1971, approved April 5, 1971, effective July 1, 1971.
Hawaii:	Hawaii Revised Statutes, Title 21, ch. 378, §§378-1 to 378-10.
Iowa:	Iowa General Act 61, ch. 121, §1.
Kentucky:	Kentucky Revised Statutes, ch. 344, §§344.010 to 344.515.
Louisiana:	L.S.A. Revised Statutes, Chapter 9, Title 23, §§892, 893.
Maine:	Maine Revised Statutes Annotated, Title 5, Part 12, ch. 317, subchapters I-VI.
Maryland:	Annotated Code of Maryland, Article 49B, §§1-30.
Massachusetts:	Massachusetts General Laws ch. 149, ch. 151B; *see also* Governor's Code of Fair Practices, Executive Order No. 79 (July 20, 1970).
Michigan:	Michigan Compiled Laws Annotated, §§423.301 to 423.311.
Montana:	Montana Revised Code, Title 64, §§64-304 to 64-312.
Nebraska:	Revised Statutes of Nebraska, §§48-1001 to 48-1009.
Nevada:	Nevada Revised Statutes, ch. 613, §§310-430.
New Hampshire:	New Hampshire Revised Statutes Annotated, Title 31, ch. 354-A, §§354A-1 to 354A-14.
New Jersey:	New Jersey Statutes Annotated, Title 10, ch. 5, §§10:5-1 to 10:5-28.
New Mexico:	New Mexico Statutes Annotated, Chapter 4, Art. 33, §§4-33-1 to 4-33-13.
New York:	McKinney's Consolidated Laws of New York Annotated, Chapter 15, §§290-301.
North Dakota:	H.B. 918, L. 1965, §1-2, effective July 1, 1965.
Oregon:	Oregon Revised Statutes, §§659.010 to 659.115, 659.990.
Pennsylvania:	Purdon's Pennsylvania Statutes Annotated, Title 43, ch. 17, §§951-963.
Puerto Rico:	Law of Puerto Rico Annotated, Title 29, Part 1., ch. 7, §§146-152.
South Carolina:	H.B. 3370 Laws 1972, effective June 23, 1972.
Texas:	Vernon's Annotated Revised Civil Statutes of Texas, Article 6252-14.

(Cont'd)

declares it to be against public policy to dismiss from employment any person between the ages of 45 and 65.[30] The statute has been held to be like a criminal statute. *Johnson v. U.S. Steel Corp.*, 348 Mass. 168 (1964).

Mass. Gen. Laws ch. 32, §26(3)(a) would seem unlawful on its face under the provisions of Mass. Gen. Laws ch. 151B, the broad-sweeping anti-discrimination statute of Massachusetts (hereinafter the "statute").

Retirement of members of the Uniformed Branch is the action of an "employer" under the statute. Section 1(5) declares that "[t]he term 'employer' . . . shall include the Commonwealth and all political subdivisions, boards, departments and commissions thereof."

The appellee, age 50 at the time of his retirement, is a covered "employee" under the statute.[31]

(Cont'd)

Washington:	Revised Code of Washington, Title 49, ch. 49.60, §§49.60.010-49.60.320.
West Virginia:	West Virginia Code, Chapter 5, Art. 11, §§5-11-1 to 5-11-19.
Wisconsin:	Wisconsin Statutes Annotated, Title 13, ch. 111, subchapter II, §§111.31 to 111.37.

30. Mass. G. L. ch. 149, §24A.

31. Section 1(6) of the statute defines employee by listing those not included. "The term 'employee' does not include any individual employed by his parents, spouse or child, or in the domestic service of any person."

The statute extends its protection to those covered employees between the ages of 40 and 65, unless a different meaning clearly appears from the context. Section 1(8).

Action by the Commonwealth as an "employer" under the statute in mandatorily retiring all those uniformed officers age 50 pursuant to the challenged statute is clearly an unlawful practice under Section 4(1) of the statute. That section makes it unlawful for an employer by his own actions or those of his agent "because of the . . . age . . . of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual in compensation or in terms, conditions or privileges of employment unless based upon a bona fide occupational qualification."

Appellee submits that the Commonwealth cannot show that mandatory retirement at age 50 is a bona fide occupational qualification because, as the district court concluded, the appellee has established the absence of any factual basis for mandatory retirement at age 50. 376 F. Supp. at 756.

Finally, in Executive Order No. 74 of July 20, 1970, entitled the Governor's Code of Fair Practices, it is declared to be the policy for all state agencies to refrain from all discrimination in employment including discrimination based upon age.

The thrust of the legislative policy as expressed in Congress and in the state legislatures is to strike down classifications based upon generalized misconceptions as to age, and to institute in their stead procedures to measure the individual's qualifications, abilities and needs, regardless of age.

Both Congress and the Massachusetts General Court enacted these remedial statutes on the strength of determinations that job performance is not related to the attainment of an

arbitrary age.[32] When reviewing the mandatory retirement statute applicable to members of the Uniformed Branch of the State Police, the Court must give weight to these legislative determinations. *Cf. Frontiero v. Richardson, supra* at 687-688; *Oregon v. Mitchell, supra* at 248-249 (opinion of Brennan, White and Marshall, J.J.); *Katzenbach v. Morgan*, 384 U.S. 641, 648-649 (1966).

CONCLUSION

For the reasons stated above the decision of the district court should be affirmed.

Respectfully submitted,

s/ Robert D. City

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32. 29 U.S.C. §621(a)(2); Mass. H. Doc. No. 3677 (1966).

Supreme Court, U. S.
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No. 74-1044

In The Supreme Court of The United States
OCTOBER TERM, 1974

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

AMICUS CURIAE BRIEF OF STATE POLICE ASSOCIATION OF MASSACHUSETTS IN SUPPORT OF APPELLANTS

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COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

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PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 42, consent of the parties having been obtained, the State Police Association of Massachusetts files this Brief as Amicus Curiae in support of the Appellants.

QUESTION PRESENTED

Whether the Massachusetts statute mandating the retirement of a State Police officer upon reaching the age of fifty is constitutional?

STATEMENT OF INTEREST OF STATE POLICE ASSOCIATION OF MASSACHUSETTS

The State Police Association of Massachusetts (hereafter Association) is the certified and recognized collective bargaining agent and representative of and for the 966 members of the Uniformed Branch of the Massachusetts State Police in and holding the ranks of Trooper, Policewoman, Corporal, Sergeant and Staff Sergeant. The total complement of the Uniformed Branch is 1020, of which number 54 are in the ranks of Lieutenant, Captain, Major, Lieutenant Colonel and Deputy Superintendent.

The Association filed an amicus curiae brief in the United States District Court for the District of Massachusetts in support of Appellants.

The Association's interest in the mandatory retirement statute is to maximize the physical capability of members of the Uniformed Branch, to assure increased promotion opportunities, and, thereby, to advance and encourage employee morale and incentive.

STATEMENT OF THE CASE AND JURISDICTION

The Association, as Amicus Curiae, hereby adopts the Statement of the Case of the Appellants, as well as their Statement of Jurisdiction.

ARGUMENT

I. MANDATORY RETIREMENT FOR UNIFORMED STATE POLICE OFFICERS AT AGE 50 (OR AFTER 20 YEARS OF SERVICE, WHICHEVER OCCURS LAST) IS CONSTITUTIONAL BECAUSE IT BEARS A RATIONAL RELATIONSHIP TO THE FURTHERANCE OF A LEGITIMATE STATE PURPOSE.

Members of the Uniformed Branch of the Massachusetts State Police are required to perform their jobs under conditions of physical and mental stress greater than those of state police detectives, municipal police and other public service employees. As a result, Massachusetts, in order to maximize the physical capability of its Uniformed State Police, must maintain a force which is young and vigorous. The challenged statute advances this legitimate state purpose. The medical evidence introduced by both plaintiff and the defendants, in this regard, clearly proves and the district court stated that there is a "general relationship between advancing age and decreasing physical ability to respond to the demands of the job", and is thus supportive of such state purpose. 376 F.Supp. 753 at 755.

Although the district court accepted the need for an arbitrary cut-off which may force the retirement of some individuals who are still fit for duty (376 F.Supp. at 755), it ruled that the 50 year old mandatory retirement age was unconstitutional because there had been no study or determination made that age 50 is a "critical area" requiring such cut-off (376 F.Supp. at 756). In so doing, the district court, in effect, shifted the burden to the defendants to prove the rationality of the challenged statute and ignored medi-

cal evidence submitted by the defendants that age 50 is such a "critical area".

This Court has long held that the test of "rationality" is appropriate in the area of economics and social welfare, *Dandridge* v. *Williams*, 397 U.S. 471 (1970). The right to remain employed, which is the underlying issue presented in this case, properly belongs in the area of economic and social welfare. See *Kotch* v. *Board of River Port Pilot Commissioners*, 330 U.S. 552 (1947). In addition, the plaintiff has the burden of proving that the statutory classification challenged by him lacks rationality, *McGowan* v. *Maryland*, 366 U.S. 420, 426 (1960). In *McGowan*, this Court also noted that the "constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective . . ." *Id.* at 425. It does not in this case.

This Court has applied a variation of the rational relationship test in a sex discrimination case challenging a federal statute which required male naval line officers to retire before female officers. *Schlesinger* v. *Ballard*, ... U.S. ...., 43 U.S.L.W. 4158 (1975). In *Schlesinger*, this Court upheld a federal statute which requires men who have been passed over for promotion twice to retire after 10 years of naval service even though women officers are not so required until after 13 years of service. This court examined the statute to determine whether there was an "archaic and overbroad generalization" for achieving administrative convenience and upheld the "complete rationality" of that legislative classification. In addition, and importantly, this Court recognized the validity of a policy creating a flow of promotions to motivate personnel.

An examination of the evidence in this case demonstrates

that plaintiff has failed to satisfy his burden under the rational relationship test. In addition, the evidence supports the constitutionality of *mandatory retirement at age 50* even under the more stringent standard applied in *Schlesinger*.

A. The State has a valid interest in promoting a young and vigorous State Police Force.

Uniformed State Police officers are required to perform arduous and demanding duties. In this regard, the Commissioner of Public Safety has stressed the "physical capability of the uniformed officer" and the need for him to "be able to react swifty and strongly" (App. 54). And he has observed that "younger officers are generally more capable than are older officers in performing physical functions" (App. 55). Such physical capability is affected by stress factors, both physical and mental, implicit in the job and contributed to by the strict discipline and military nature of the State Police, and because they usually work "alone" (App. 57).

Colonel Paul Murphy, the State Police Surgeon, referred to the physical and mental stress factors of the job. When asked for his medical opinion of the mandatory age 50 retirement, he replied that he would prefer retirement of a member of the Uniformed Branch after 20 years of service or age 50, whichever occurs *first* (App. 173). Parenthetically, the retirement system suggested by Colonel Murphy would reduce the age of members of the Uniformed Branch, and mandate earlier retirements than does the challenged statute. Colonel Murphy testified that a 50 year old State Police officer is not physically fit to perform "full duty status" (App. 185). He also testified that higher ranking officers in the Uniformed Branch were more sus-

ceptible to heart disease because of the "additional problems of responsibility" (App. 186-7).

Such higher ranking officers as well as all other members of the Uniformed Branch are required to perform the arduous and demanding duties of the job. As example, the plaintiff, who held the rank of Lieutenant Colonel, was required to lead the troops in all disturbances, (see App. 50). Colonel Murphy, on further examination by plaintiff's counsel, stated that a Lieutenant Colonel would "be required to go into Walpole, inside the prison and engage in hand-to-hand activity" and "would . . . be likely to be driving along Route 495 at 2:00 A.M. in the morning and discover a fatal accident" (App. 189; see also App. 50).

The district court acknowledged that Massachusetts is entitled to maintain rigorous job requirements and that plaintiff did not contend otherwise. 376 F.Supp. at 754.

B. Duties of members of the Uniformed Branch of the State Police differ from those of State Police detectives and municipal police.

The duties of Uniformed State Police officers differ from and are more demanding than those of municipal police.[1] Municipal police officers (and State Police detectives), unlike members of the Uniformed Branch of the State Police, are in the classified civil service system of the Common-

[1] The district court, in a footnote to its decision, stated:

"We assume, at least for present purposes, that the duties are sufficiently more arduous than, or the physical and mental stresses significantly different from those of detectives or policemen in other branches and at other levels of government, so that there is no viable unequal protection claim in this area". 376 F.Supp. at 754 n. 3.

wealth (Mass. Gen. Laws, ch. 31, sec. 20). And unlike members of the Uniformed Branch whose police powers are statewide (Mass. Gen. Laws, ch. 22, sec. 3A), municipal police officers have police powers only within the city or town in which they serve (Mass. Gen. Laws, ch. 41, sec. 98), except when in another city or town in "fresh and continued pursuit" (Mass. Gen. Laws, ch. 41, sec. 98A), or when requested for service in another city or town by its mayor, selectmen or chief of police (Mass. Gen. Laws, ch. 41, sec. 99). The Uniformed Branch and municipal police departments also have distinct operational characteristics. "The Uniformed Branch is a relatively small force designed to cover the entire state. As a result, a state police cruiser is generally manned by only one officer, must cover a wide geographical area and may be as much as thirty minutes away from back-up assistance in case of emergency. On the other hand, a municipal cruiser is generally manned by two officers, must cover a limited geographical area and is generally only a few minutes away from back-up assistance." (App. 57).

Municipal police forces tend to assign administrative duties to older officers. The Uniformed Branch assigns "civilians rather than uniformed officers to administrative duties wherever possible", thereby freeing "more officers for field or patrol duty". For example, the Uniformed Branch employs civilians as radio dispatchers, whereas municipal police departments generally assign uniformed officers to such duty (App. 57-8).

The State Police Surgeon, Colonel Murphy, testified that the duties of members of the Uniformed Branch are "more stressful" than those of municipal police officers. When asked in what ways are the duties of the Uniformed Branch physically stressful, he answered,

"[N]umber one, a State Policeman generally works alone. This is as opposed to most of your municipal Police Departments where they work together. It is a small force covering the entire state as opposed to — if you take the Boston Police Department of approximately 2,100 or 2,300 covering a small area. Therefore, you have already the mental stress of knowing that you do not have immediate backup.

The State Police is . . . the backup force. He is the one that is called on in riots, or he is the one that is called on when you have a problem as you did at Walpole or at Norfolk. These are both physically and mentally stressful. It is a State Police officer who is the one that is apt to be out on Route 495 with an accident at 2:00 o'clock in the morning and there is no one around. There is both physical exertion involved here and mental stress." (App. 143-4; see also App. 57).

In this regard, plaintiff's counsel asked Colonel Murphy whether the requirement for physical strength on the part of a member of the Uniformed Branch was greater than that of a member of the Boston Police Department. Colonel Murphy answered "Yes . . . because he usually is working alone; he does not have assistance" (App. 147).

State Police detectives, as their title implies, perform quite different and less arduous functions than those of the Uniformed Branch. State Police detectives do not perform road patrol, do not restore and maintain order in prison and civil disorders, do not respond to emergencies and natural disasters, do not contain disorderly assemblies, and do not perform undercover, beard or disguise work. Members of the Uniformed Branch perform all of these duties. Detectives perform no command function, drive in unmarked cars, wear civilian clothes, and are regularly scheduled to work a day shift, Monday through Friday, with Saturday and Sunday as regular days-off weekly (App. 54-56). Unlike the detectives, members of the Uniformed Branch perform command functions, patrol highways in marked cruisers, wear uniforms, and are regularly scheduled to work three general work shifts, each of which is divided into three sub-shifts, providing 24 hour coverage. Additionally, members of the Uniformed Branch generally work a rotating four days on, two days off schedule, which does not provide the stability of the same regular days-off weekly, let alone regular Saturdays and Sundays off weekly which the detectives enjoy. (App. 56).

The State Police Surgeon, Colonel Murphy, also testified that the duties of members of the Uniformed Branch are more stressful than those of the detectives (App. 168-9). This is clearly evident by comparing disability statistics for each group. During the period November, 1967 - December, 1973, no detective retired for a service-connected disability (App. 56). During the same period of time, many members of the Uniformed Branch retired for disability (see 376 F.Supp. at 756).

C. Medical evidence supports the rationality of requiring Uniformed State Police to retire at age 50.

Medical evidence introduced by both plaintiff and the defendants supports the rationality of the challenged statute. Plaintiff's experts conceded, as noted by the district court, that "there is a general relationship between advancing age and decreasing physical ability to respond to the demands of the job". 376 F.Supp. at 755.

The State Police Surgeon, Colonel Murphy, testified that the incidence of hypertension among Trooper members of the Uniformed Branch between the ages of 40 and 50 is "twice what you would expect in the normal population" (App. 144), that the "higher ranking officer is even more susceptible because he also has the additional problem of responsibility" (App. 186-7), and that the average State Police officer is not physically fit to perform full duty at age 50 (App. 185). His testimony was not rebutted by plaintiff's medical witnesses.[2] In fact, one of plaintiff's witnesses, Dr. Thomas R. Dawber stated:

> ". . . I assume that the rationality of this statute is, that it is assumed that the younger the individual is, the more able he is to respond to the demands of the job, and that as the individual gets older his ability to do this becomes less. I think that is basically true" (App. 84-85).

D. Morale of the Uniformed Branch is increased by requiring retirement at age 50.

The retirement system of the Uniformed Branch of the State Police advances morale within the ranks by increasing opportunities for promotion. Retirement at age 50 opens up superior officer positions sooner than would be

[2] Of the three physicians deposed by the plaintiff, Colonel Murphy was the only medical witness with long-standing, expert knowledge of the duties of members of the Uniformed Branch. In addition, he has day to day experience with the physical and mental stress requirements of the job, and the medical concerns of members of the uniformed Branch (App. 177-8). The doctors whose testimony was offered in behalf of plaintiff had no experience with the Uniformed Branch, or with detectives of the State Police or municipal police officers for that matter. They were supplied copies of the Rules and Regulations of the Uniformed Branch by the plaintiff just prior to the taking of their depositions. (App. 70-1). Reading the Rules and Regulations is no substitute for Colonel Murphy's knowledge of and work with the Uniformed Branch.

the case with a later retirement age. Thus, retirement of a Lieutenant Colonel at age 50 creates openings in the ranks of Major, Captain, Lieutenant, Staff Sergeant, Sergeant and Corporal and permits all members to advance more rapidly to "higher levels of command."

This is similar to the "up or out" advancement policy of the Navy which this Court, in *Schlesinger,* recognized as valid. There, this Court stated:

> "[T]he operation of the statutes in question results in a flow of promotion commensurate with the Navy's current needs and serves to motivate qualified commissioned officers to so conduct themselves that they may realistically look forward to higher levels of command". 43 U.S.L.W. at 4162.

II. THE ESTABLISHMENT OF 50 YEARS OF AGE AS THE CUT-OFF MARK IS A RATIONAL MEANS TO ACHIEVE THE LEGISLATIVE PURPOSE AND WAS NOT ESTABLISHED MERELY FOR ADMINISTRATIVE CONVENIENCE.

All retirement systems choose a cut-off date. Whether it is 50 years of age for Uniformed Massachusetts State Police, 55 years of age for F.B.I. agents, or 60 years of age for airline pilots, all cut-off dates for retirement systems draw a line which may exclude individuals who are qualified. See *Weiss* v. *Walsh,* 324 F.S. 75, 77 (D.N.Y. 1971), *aff'd* 461 F.2d 846 (2d Cir. 1972), *cert. denied* 410 U.S. 970 (1973). The district court accepted the fact that there must be an "arbitrary" cut-off date, but ruled that age 50 is illegal because there was no "readily discernible breaking, or turning point". 376 F.Supp. at 755. The district court, in effect, ruled that there must be individual testing rather

than a fixed cut-off at age 50. Its decision was incorrect because the medical evidence, in light of the function and purpose of the Uniformed Branch, supported a cut-off age of 50.

Testimony of Colonel Murphy, the State Police Surgeon, was that age 50 is a "critical area." He also stated that in his opinion the average State Police officer, at age 50, is *not* physically fit to perform the full duties required of members of the Uniformed Branch (App. 185). In addition, Colonel Murphy testified that there is an increased incidence of heart disease between age 40 and 50, that the rate of aging progresses more rapidly from age 40 on, and that there is no medical examination which can adequately predict whether an individual over 50 is sufficiently healthy to permit him to perform the duties of a State Trooper (App. 173-4).

Although plaintiff's experts disagreed with the age 50 retirement, their testimony tended to corroborate Colonel Murphy's opinion. As example, Dr. Thomas R. Dawber agreed that the activities of the State Police cause an increased possibility of heart attack which becomes more significant as an individual grows older (App. 87). Although Dr. Dawber disagreed with retirement at age 50, he testified that there is an increasing rate of disability as one approaches the middle 50's and older (App. 87).

The medical evidence established that age 50 is a "critical area" in which individual medical testing is inadequate to maintain a State Police force capable of performing its duties. The statement of the district court that "no expert testif(ied) to any significance in age 50 in a group which . . . had individually passed annual tests during the preceeding decade," 376 F. Supp. at 756, is incorrect. Colonel Murphy so testified (App. 173-4).

Although Massachusetts appears to be the only state requiring retirement of State Police officers before age 55,[3] it is impossible to declare the challenged statute unconstitutional without affecting all mandatory retirement statutes. If, arguendo, the medical evidence in this case is insufficient to justify an age 50 retirement, it could be contended by the plaintiff that it would not justify retirement of members of the Uniformed State Police at age 55 or 60. In addition, compulsory retirement of administrative, clerical or professional personnel could similarly lack justification even at age 65, or 70 for that matter. See *Weisbrod* v. *Lynn*, 383 F. Supp. 933 (D.D.C. 1974), *aff'd*, 43 U.S.L.W. 3461 (U.S. Feb. 25, 1975). Therefore, an opinion of this Court affirming the district court decision would drastically affect all mandatory retirement systems in the country.

III. RETIREMENT OF UNIFORMED STATE POLICE AT AGE 50 IS NOT UNDULY BURDENSOME BECAUSE ACCELERATED PENSION BENEFITS COMPENSATE FOR SUCH RETIREMENT.

Uniformed State Police officers are entitled to retire with greater pension benefits after 20 years of service or at age 50 than are detectives or municipal police officers.

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[3] Plaintiff in his Motion to Affirm the decision of the district court, noted that there is pending in the Massachusetts legislature a proposed amendment (H. 2167) to the challenged statute which, if enacted, would raise the retirement age to 55 (App. A to Appellee's Motion to Affirm). As of July 11, 1975, the Massachusetts legislature had taken no action on this proposed amendment.

In 1939, Chapter 22, Section 9(a) of the Massachusetts General Laws was amended to provide that "no person over thirty years of age shall be enlisted for the first time as an officer of the division of State Police". In 1939, the statutory Uniformed Branch twenty year-50 percent retirement pension was enacted into law (Chap. 503, Acts of 1939). Thus the plaintiff, who was appointed on April 7, 1948, could have voluntarily retired on April 7, 1968, after 20 years of service, with a pension equal to fifty (50) percent of his then *single* highest year's pay. Since April 7, 1968, his pension incremented by one percent annually, until retirement. Mass. Gen. Laws, ch. 32, Sec. (3) (c).

The twenty year-50 percent minimum pension for members of the Uniformed Branch is a "service" pension, so-called, that is, one computed solely on the basis of years of service. As example, a member of the Uniformed Branch who enlists at age 21 receives, after 20 years of service, the same 50 percent pension to which a member who enlists at age 29 and serves 20 years, is also entitled. To our knowledge, members of the Uniformed Branch are the only state or municipal employees entitled to receive a pension so computed.

Contrariwise, the statutory pension system for municipal police officers and State Police detectives is an "age" pension, so-called; the older the employee, the higher the rate of his pension. Mass. Gen. Laws, ch. 32, Section 5 (2) (a); Section 10 (1).[4] A municipal police officer or State Police

[4] Municipal police and State Police detectives are classified in Group 4. The following table shows the percentage of the amount of average annual rate of regular compensation to be multiplied by the number of years of creditable service in determining pensions of municipal police or State Police detectives.

detective who enlisted at age 21 and served 20 years would be entitled to only a 2% pension;[5] if he enlisted at age 25 and served 20 years, he would be entitled to a 30% pension, and if he enlisted at age 30 and served 20 years, he would be entitled to a 40% pension, in each instance, based on his average annual rate of pay received during a *three* (3) year period. Mass. Gen. Laws, ch. 32, sec. 5 (2) (a).

The foregoing analysis of pension benefits for municipal police officers and State Police detectives is based upon recently liberalized retirement allowance provisions of the Massachusetts pension system (Chap. 826, Acts of 1967 — municipal police; Chap. 992, Acts of 1971 — State Police detectives). At the time of plaintiff's enlistment in the Uniformed Branch, pension benefits for such municipal officers and detectives were financially less rewarding than those provided by this recent legislation, and such liberalized pension benefits still do not provide them the 20 year-50 percent "service" pension to which members of the Uniformed Branch are entitled. Thus, the twenty year-50

	Age Last Birthday at Date of Retirement		
Percent	*Group 1*	*Group 2*	*Group 4*
2.5	65 or over	60 or over	55 or over
2.4	64	59	54
2.3	63	58	53
2.2	62	57	52
2.1	61	56	51
2.0	60	55	50
1.9	59	—	49
1.8	58	—	48
1.7	57	—	47
1.6	56	—	46
1.5	55	—	45

[5] Pursuant to Mass. Gen. Laws, ch. 32, sec. 10 (1), if such municipal police officer or detective retired after 20 years of service, let us say at age 41, the per cent to be used in computing his allowance is reduced by one-tenth of one percent for each year his age is under 45, based on a Group 1 allowence. At age 45, the Group 1 percent is .5.

percent, *single* highest year's pay pension for members of the Uniformed Branch, unlike the pension entitlement of municipal police officers and State Police detectives age 50 or younger, or with 20 or less years of service, provided then, as it does now, substantially greater economic benefits upon retirement to Uniformed Branch members. These pension benefits were part of the career compensation plaintiff opted for on enlistment in the Uniformed Branch, and are full and valid compensation for a career in said Branch which mandates retirement at age 50 or after twenty years of service, whichever last occurs. Without more, such pension benefits justify the statutory classification here challenged by plaintiff. Moreover, this entitlement to a 50 percent pension (at a minimum) was part and parcel of a legislative determination that members of the Uniformed Branch be retired at age 50 in order to assure a young, vigorous State Police force.

IV. THIS COURT HAS PREVIOUSLY HELD VALID A STATE POLICE COMPULSORY RETIREMENT SYSTEM. *McILVAINE* v. *PENNSYLVANIA*, 415 U.S. 986 (1974).

An appeal to this Court of the decision of the Pennsylvania Supreme Court, upholding compulsory retirement of Pennsylvania State Police at age 60, or after 20 years of service, whichever last occurs, was dismissed for want of a substantial federal question. *McIlvaine* v. *Pennsylvania*, 454 Pa. 129, 309 A.2d 801 (1973) *appeal dismissed*, 415 U.S. 986 (1974). The effect of this dismissal is a binding decision on the merits. *Ohio ex rel. Eaton* v. *Price*, 360 U.S. 246, 247 (1959); See Stern and Gessman, *Supreme Court Practices* 197 (4th ed. 1969); Hart and Wechsler, *The Federal Courts and the Federal System* 573-6 (1953); Robertson and Kirkham, *Jurisdiction of the Supreme Court of the United States* Sec. 58. In *Weisbrod* v. *Lynn*, *supra*, a three judge district court upheld the constitutionality of the federal mandatory retirement statute, 5 U.S.C. 8335, citing this Court's decision in *McIlvaine*.

V. THE CHALLENGED STATUTE DOES NOT CREATE AN IRREBUTTABLE PRESUMPTION VIOLATIVE OF DUE PROCESS.

The challenged statute does not create an irrebuttable presumption such as that struck down by this Court in *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974). In *LaFleur*, this Court ruled that maternity leave regulations which required pregnant teachers to be discharged in their fifth or sixth month of pregnancy created an irrebuttable and illegal presumption of unfitness to teach. This Court based its decision on the fact that pregnancy involves a fundamental right to be free from governmental intrusion into matters so "fundamentally affecting a person as the decision whether to bear or beget a child". There is no such fundamental right in this case.

Also, in *LaFleur*, this Court stated that there was no medical evidence in the record to support the regulation requiring discharge of teachers in the fifth or sixth months of pregnancy, 414 U.S. at fn. 13. In this case, medical and other evidence relative to the challenged statute is in the record. For example, the State Police Surgeon, Colonel Murphy, testified that the incidence of hypertension among Trooper members of the Uniformed Branch between the ages of 40 and 50 is "twice what you would expect in the normal population" (App. 144), that the "higher ranking officer is even more susceptible because he also has the

additional problem of responsibility" (App. 186-7), and that the average State Police officer is not physically fit to perform full duty at age 50 (App. 185).

In addition, this case, unlike that of *LaFleur*, is not one in which the "interest of administrative convenience" has been argued as justification for the challenged statute. Defendants have proved, unlike the school board in *LaFleur*, a reasonable justification for the statute. The challenged statute does serve a "legitimate state interest", and is neither arbitrary, irrational or unfair.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Respectfully submitted,

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Service of the within and receipt of a copy thereof is hereby admitted this ..... day of August, A.D. 1975.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1974
No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

vs.

ROBERT D. MURGIA,

Appellee.

On Appeal From the United States District Court for the District of Massachusetts.

Brief of Amici Curiae, the American Association of Retired Persons, the National Retired Teachers Association, and the National Senior Citizens Law Center.

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IN THE

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ROBERT D. MURGIA,

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Brief of Amici Curiae, the American Association of Retired Persons, the National Retired Teachers Association, and the National Senior Citizens Law Center.

Interest of Amicus.

This brief amicus curiae is filed without motion, as permitted by Rule 42, the prior consent of the parties having been obtained. See Exhibit "A", attached hereto.

Your amicus National Senior Citizens Law Center is a Legal Services backup center which provides technical assistance to Legal Services attorneys throughout the United States with respect to legal problems affecting the low income elderly. Among the subjects of

study by said amicus is the subject of mandatory retirement which experience has demonstrated is a matter of vital concern to its client community.

Your amicus American Association of Retired Persons is a not-for-profit membership corporation of more than 7,500,000 persons over the age of 55. Your amicus National Retired Teachers Association is a not-for-profit membership corporation of over 450,000 retired teachers and school administrators. The latter two organizations are affiliated and jointly administered and their more than 8,000,000 members represent the largest organized group of older Americans in this country. Among the purposes of the American Association of Retired Persons are: to improve the quality of life for older people in this country; to understand aging and its ramifications; to offer older citizens opportunities to plan a way of life designed to attain maximum enrichment; and to help foster equality of opportunity for the aging population in this country. Among the purposes of the National Retired Teachers Association are: to promote the professional and economic status of retired teachers; to afford retired teachers an opportunity for the interchange of information and opinion on subjects of common interest; to aid retired teachers to receive available services and benefits; and to facilitate united action amongst those devoted to the welfare of retired teachers.

The American Association of Retired Persons and the National Retired Teachers Association believe that age-motivated retirement practices are wrong because they deprive our nation of the wisdom, experience and productivity of some of its most capable citizens and because they deprive affected individuals of a right

that should be limited only by ability, desire and need, and not by age, a factor which is neither an accurate nor appropriate criterion for distinguishing the abilities of workers.

Summary of Argument.

Work is one of the most important aspects of human existence and the freedom to work is an interest of constitutional dimensions. State or federal legislation which has the effect of depriving absolutely a person of gainful employment must be justified by a public interest. Laws requiring or resulting in retirement of workers physically or mentally unable to work are constitutionally permissible. Likewise, discharge, whatever the reason, is free of constitutional restraint provided its effect is not to positively divest an individual of meaningful employment opportunities.

The practical effect of involuntary retirement, for most people, is loss of the means for gainful employment; alternative job opportunities are, as a practical matter, non-existent. Because of the magnitude of the deprivation which involuntary retirement entails, where governmental action is present, the Fourteenth Amendment requires a strong countervailing public interest. In the absence of exceptional circumstances, workers who desire to remain employed past a given retirement age have a constitutional right to a meaningful hearing to disprove the factual assumptions underlying the proposed involuntary retirement. The record below demonstrates no governmental interest which would justify dispensing with such a hearing and, accordingly, the judgment should be affirmed.

I.

Freedom to Work Is an Important Constitutional Value.

Throughout the decades, freedom to work in the common occupations of life has been the subject of much constitutional litigation. The constitutional protections surrounding the freedom to pursue one's chosen occupation were articulated by this Court at least as early as the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872), in which debate centered around the substantive contents, respectively, of the Privileges and Immunities Clauses of Article IV §2 and the Fourteenth Amendment to the Constitution. *Compare* the majority and dissenting opinions in *Butchers Benevolent Association of New Orleans v. Crescent City Livestock Landing and Slaughterhouse Co.*, 83 U.S. (16 Wall.) 36 (1872), and *Butchers Union Slaughterhouse and Livestock Landing Co. v. Crescent City Livestock Landing and Slaughterhouse Co.*, 111 U.S. 746 (1884); and *see Twining v. New Jersey*, 211 U.S. 78 (1908). Although this Court was divided as to the content of the Privileges and Immunities Clause of the Fourteenth Amendment, there was unanimity concerning the Privileges and Immunities Clause of Article IV §2. Both the majority and minority concurred in an early formulation by Associate Justice Washington in *Corfield v. Coryell*, 6 Fed. Cas. 546, 4 Wash. D.C. 371 (1823):

> ". . . [T]hose privileges and immunities which are, in their nature, fundamental; which belong, of right, to the citizens of all free governments; . . . the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; . . . . The right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise. . . ." 6 Fed. Cas. at 551, 552.

Mr. Justice Bradley, in his concurring opinion in *Butchers Union Slaughterhouse and Livestock Landing Co. v. Crescent City Livestock Landing and Slaughterhouse Co., supra,* was more specific concerning employment:

> ". . . The right to follow any of the common occupations of life is an inalienable right, it was formulated as such under the phrase 'pursuit of happiness' in the Declaration of Independence, which commenced with the fundamental proposition that 'All men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty and *the pursuit of happiness.*' This right is a large ingredient in the civil liberty of the citizen. . . ." 111 U.S. at 762.

Hence, according to the early teachings, by virtue of the Privileges and Immunities Clause of Article IV §2 of the Constitution, "the right to follow any of the common occupations of life" is "fundamental" and endowed with corresponding protections.[1]

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[1]In *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), this Court stated, in part:

> ". . . It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws. Thus, the key to discovering whether education is 'fundamental' is not to be found in comparisons of the relative societal significance of education as opposed to subsistence or housing. Nor is it to be found by weighing whether education is as important as the right to travel. Rather, the answer lies in assessing whether there is a right to education explicitly or implicitly guaranteed by the Constitution. . . ." 411 U.S. at 33.

The "fundamental" interest in interstate travel upon which *Shapiro v. Thompson*, 394 U.S. 618 (1969), was based is, at

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The *Slaughterhouse Cases* rested upon the Privileges and Immunities Clause of Article IV §2; later decisions by this Court utilized the Due Process Clause of the Fourteenth Amendment to protect the right to labor. In *Smith v. Texas,* 233 U.S. 630 (1914), this court invalidated a state criminal statute which made it unlawful for a person to serve as a train conductor without first having served two years as a brakeman. The decision was predicated upon the absence of a factual relationship between that requirement and the permissible objective of insuring competent conductors; therefore, the statute conflicted with the following principle:

> "Life, liberty, property, and the equal protection of the law, grouped together in the Constitution, are so related that the deprivation of any one of those separate and independent rights may lessen or extinguish the value of the other three. Insofar as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guaranty is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling." 233 U.S. at 636.

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least in part, grounded upon the Privileges and Immunities Clause of Article IV §2, *Shapiro v. Thompson, supra,* 394 U.S. at 630 n. 8; thus, it would seem, freedom to work could be considered equally "fundamental." *Corfield v. Coryell, supra,* 6 Fed. Cas. at 552.

Similarly, in *Truax v. Raich,* 239 U.S. 33 (1915), this court, in disapproving a state statute requiring private employers to discriminate against aliens, stated:

> ". . . But this admitted authority, [the police power] with the broad range of legislative discretion that it implies, does not go so far as to make it possible for the state to deny to lawful inhabitants, because of their race or nationality, the ordinary means of earning a livelihood. *It requires no argument to show that the right to work for a living in the common occupations of the community is the very essence of the personal freedom and opportunity that it was the purpose of the Amendment to secure. . . .*" 239 U.S. at 41 (emphasis added).[2]

In *New State Ice Co. v. Liebmann,* 285 U.S. 262 (1932), which invalidated a statute conditioning the manufacture and distribution of ice upon a license and providing for the issuance of a license only if the geographical area in question was underserviced, this Court stated:

> "The opportunity to apply one's labor and skill in an ordinary occupation with the proper regard for all reasonable regulations is no less entitled to protection. . ." [than] ". . . the fundamental doctrine of freedom of the press. . . ." 285 U.S. at 280.[3] (quote transposed for clarity).

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[2]*Truax v. Raich, supra,* was cited, discussed, and quoted with approval in *In re Griffiths,* 413 U.S. 717 (1973), which invalidated a state law conditioning bar admission upon U.S. citizenship. *In re Griffiths* began with alienage as the major premise while *Truax* was premised upon "the right to work for a living in common occupations of the community."

[3]In *Colorado Spring Amusements, Ltd. v. Rizzo,* 387 F.Supp. 690 (E.D. Pa. 1974), the court, citing *Liebmann* and *Truax v.*

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In the period following World War II, when political affiliations and beliefs were sensitive topics, the sanctity of work as a constitutional value received additional attention. In *Wieman v. Updegraff*, 344 U.S. 183 (1952), it was held that a state is forbidden by the due process clause of the Fourteenth Amendment from conditioning public employment upon a loyalty oath which embraced innocent as well as subversive activities. In the language of this Court:

> ". . . We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory . . . ." 344 U.S. at 192.

To the same effect is *Slochower v. Board of Higher Education*, 350 U.S. 551 (1956), which declared invalid a law automatically terminating the jobs of city employees who invoked the privilege against self-incrimination. Recognizing that the plaintiff did not have "a constitutional right to be an associate professor of German at Brooklyn College," 350 U.S. at 559, this Court nevertheless held that public employment could not be used as a lever for the sacrifice of other important constitutional rights.

The message of *Slochower* and *Wieman v. Updegraff, supra*, was refined in *Schware v. Board of Bar Examiners*, 353 U.S. 232 (1957), which did not in-

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Raich, supra, declared invalid a Philadelphia ordinance prohibiting massage parlor employees from treating persons of the opposite sex. In the language of the court:

> "The right to engage in a lawful business or profession without arbitrary restraints is a 'fundamental right' within the protection of the Fourteenth Amendment. . . ." 387 F. Supp. at 696.

volve a public employee but, rather, an applicant for admission to the Bar who was unsuccessful because of earlier socialistic affiliations. Finding a lack of any correlation between the plaintiff's past political activities and his present moral character and capacity to practice law, this court held the State had deprived him of due process:

> "A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the Due Process or Equal Protection clause of the Fourteenth Amendment. . . . A state can require high standards of qualification, such as good moral character or proficiency in its law, before it admits an applicant to the Bar, but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . ." 353 U.S. at 238, 239.

In the more recent decisions bearing upon employment as a constitutionally protected right, procedural due process has been the focus. In *Bell v. Burson*, 402 U.S. 535 (1971), which invalidated a state's financial responsibility law not affording an appropriate hearing prior to suspension of the license of an uninsured motorist, this Court stated:

> ". . . Once licenses are issued, as in petitioner's case, their continued possession may become essential in the pursuit of a livelihood. Suspension of issued licenses thus involves state action that adjudicates important interests of the licensees. In such cases the licenses are not to be taken away without that procedural due process required by the Fourteenth Amendment. . . ." 402 U.S. at 539.

In *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), which disapproved pre-judgment wage garnishments, this Court, though not concerned with employment as such, was concerned with the fruits of labor; and emphasized that: ". . . [g]arnishment often meant the loss of a job." 395 U.S. at 340. *Goldberg v. Kelly*, 397 U.S. 254 (1970), it is submitted, is also relevant because the interest deemed surrounded by procedural due process guarantees, though not the fruits of labor, was the equivalent for the disadvantaged.

In *Board of Regents v. Roth*, 408 U.S. 564 (1972), it was held that a non-tenured teacher had no constitutional right to a hearing prior to a decision which failed to renew his one-year contract; however, the importance of the right "to engage in any of the common occupations of life" was reiterated:

> ". . . [W]hile the court has eschewed rigid or formalistic limitations on the protection of procedural due process, it has at the same time observed certain boundaries. For the words 'liberty' and 'property' in the Due Process Clause of the Fourteeth Amendment must be given some meaning.
>
> 'While this court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment], the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men.' . . . In a Constitution for a free people, there can be no doubt that the meaning of 'liberty' must be broad indeed. . . .
>
> *There might be cases in which a state refused to re-employ a person under such circumstances that interests in liberty would be implicated.* . . ."[4] 408 U.S. at 572, 573 (emphasis added).

Later, in *Arnett v. Kennedy*, 416 U.S. 134 (1974), a majority of the members of this Court, on the strength of *Roth* and *Perry v. Sinderman*, 408 U.S. 593 (1972), found that a non-probationary federal employee had a statutory entitlement to continued employment which could be terminated only for cause, following an appropriate hearing.

Hence, governmental interference with the freedom to work has, from the beginning, implicated the Federal Constitution. Public employment has apparently been given special treatment because of the inevitable "state action" when the public servant is affected by laws or policies regulating his employment. However, as *Truax v. Raich, supra,* and *Smith v. Texas, supra,* demonstrate, governmental intrusion into *private* employment is also subject to constitutional limitations. *See also Schware v. Board of Bar Examiners, supra.*

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[4]The above quote borrowed heavily from *Meyer v. Nebraska*, 262 U.S. 390 (1923), and in that opinion Mr. Justice McReynolds borrowed from the *Slaughterhouse Cases* discussed earlier. While a broad generalization would be unwarranted, it does seem safe to observe that, historically, the Privileges and Immunities Clause of Article IV §2 of the Constitution gave some content to the concept of "substantive due process" and that the latter was instrumental in formulating the interests guaranteed by "procedural due process."

II.

The General Rule That the Employer-Employee Contract Is Terminable at the Will of Either Party Absent Legislative or Other Permissible Legal Restrictions to the Contrary, Does Not Authorize Unreasonable Governmental Interference With Freedom or Liberty to Work.

It is beyond question that, with well recognized exceptions, such as a collective bargaining agreement or civil rights legislation,[5] the employer-employee contract is terminable at the will of either party. *Buian v. J. L. Jacobs and Co.,* 428 F.2d 531 (7th Cir. 1970); *Pearson v. Youngstown Sheet and Tube Co.,* 332 F.2d 439 (7th Cir. 1964); *Meadows v. Radio Industries,* 222 F.2d 347 (7th Cir. 1955). As Mr. Justice

[5]See Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e, and the Federal Age Discrimination in Employment Act of 1967, 29 U.S.C. §621, *et seq.* As will be developed below, the thrust of your amici's argument is based upon the procedural due process strictures of the Fourteenth Amendment rather than the equal protection clause; it will also be posited that the two provisions are, within the context of the present case, so interrelated that disposition on procedural due process grounds removes any equal protection problem. It does seem appropriate, however, to note that in *Frontiero v. Richardson,* 411 U.S. 677 (1973), this Court observed that in Title VII of the Civil Rights Act of 1964 Congress "manifested an increasing sensitivity to sex-based classifications" and that "this conclusion of a co-equal branch of Government is not without significance to the question presently under consideration. . . ." 411 U.S. at 687, 688. Through the Age Discrimination in Employment Act of 1967 Congress, with respect to employment, manifested increasing sensitivity to age-based classifications. The protections of the Age Discrimination in Employment Act are limited to individuals less than 65 years of age, 29 U.S.C. §631, although some members of Congress are in favor of removing that limitation. See S. 871, 94th Cong., 1st Sess., introduced February 27, 1975 by Senator Fong, co-sponsored by Senators Brock, Church, Domenici, Fanin, Hansen, Randolph, Stafford and Williams, *Cong. Rec.,* Feb. 27, 1975, 2749-2751. It should also be noted that effective May 1, 1974 the Act was amended to embrace state employees within its protections, Sec. 28, P.L. 93-259, 88 Stat. 74, 29 U.S.C. §630(b); the amendment came too late to help the appellee, whose retirement occurred in 1972.

Powell observed in a statement arguably representing the view of a majority of the members of this Court in *Arnett v. Kennedy, supra:*

> "No property interest would be conferred, for example, where the applicable statutory or contractual terms, either expressly or by implication, did not provide for continued employment absent 'cause'." 416 U.S. at 167 n. 2.

Thus the interest in government employment enunciated in *Arnett* does not flow directly from the Constitution but, rather, from the language of the statute creating the "entitlement." As a general proposition, there would be nothing wrong with a statute limiting public employment to one year, two years, or five years with respect to any particular job, just as there is nothing wrong with a contract of employment limited to a specified duration.

However, it is equally true, as the cases discussed earlier demonstrate, that governmental intrusion into an individual's freedom to earn a living may not be so unreasonable as to substantially curtail that freedom with no corresponding justification. To deprive a physician of his license to practice medicine, for example, would not be permitted by the due process clause unless justified by a legitimate state interest; a state may disqualify an illegal abortionist from the practice of medicine, but the factual basis for such action must be established at a fair hearing. *Withrow v. Larkin,* 421 U.S. ...., 95 S.Ct. 1456 (1975). Likewise, an individual who advocates the forceful overthrow of his government may be disqualified from practicing law; however, the factual justification must first be established in accordance with the safeguards of procedural

due process. *Schware v. Board of Bar Examiners, supra,* 353 U.S. 232 (1957); *Willner v. Committee on Character,* 373 U.S. 96 (1963). Again, it is believed that had the State of Oklahoma in *Wieman v. Updegraff, supra,* 344 U.S. 183 (1952), replaced the loyalty oath with a factual investigation into the teacher's true subversive ideas, no constitutional problem would have existed.[6] Accordingly, the general proposition that an employer/employee contract can be terminated at will by either party is subject to an important qualification; the government, either in its capacity as employer or otherwise, may not significantly curtail the freedom of an individual to earn a livelihood without first affording an appropriate hearing to determine if the facts upon which the curtailment is based exist.[7]

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[6]The decisions dealing with procedural due process rights surrounding employment, whether public or private, are to be distinguished from cases where employment, or its equivalent, is used as an instrument to chill the exercise of First Amendment rights. *See Pickering v. Board of Education,* 391 U.S. 563 (1968); *Kevischian v. Board of Regents,* 385 U.S. .... (1967); *Sherbert v. Verner,* 374 U.S. 398 (1963).

[7]That conclusion is buttressed by several decisions which consider the availability of other employment opportunities significant in assessing the need for a hearing. *Cafeteria Workers v. McElroy,* 367 U.S. 886 (1961), sustained the summary revocation by a military commander of a short order cook's pass to enter the naval gun factory to work; reliance was placed on the fact that "[t]here is nothing to indicate that this determination would in any way impair [the plaintiff's] employment opportunities anywhere else." 367 U.S. at 898, 899. *See also Wieman v. Updegraff, supra,* 344 U.S. 183 (1952); *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123 (1951). In *Board of Regents v. Roth,* 408 U.S. 564 (1972), this Court observed that:

> ". . . [T]here is no suggestion that the State, in declining to re-employ the respondent, imposed on him a stigma or other disability that foreclosed his freedom to take advantage of other employment opportunities. The State, for example, did not invoke any regulations to bar the respondent from all other public employment in state universities. Had it done so, this, again, would be a different case. . . ." 408 U.S. at 573.

III.

Involuntary Retirement of an Employee Is a Substantial Deprivation When Based Upon Age Because of the Attendant Physical, Emotional, and Economic Consequences.

Obviously, an individual must work to eat and thus freedom to work is the cornerstone of life itself. It requires no argument, therefore, to prove the magnitude of the deprivation when an individual is retired against his will under circumstances leaving him few or no alternate employment opportunities; and that is the undeniable consequence of involuntary retirement.[8] From an economic viewpoint, the situation is ameliorated somewhat by the existence of public and private retirement plans and government programs such as Titles II and XVI of the Social Security Act; 42 U.S.C. §401, *et seq.;* 42 U.S.C. §1381, *et seq.* However, it is submitted, this Court can take judicial notice of the

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See Sims v. Fox, 505 F.2d 857 (5th Cir. 1974); *Adams v. Walker,* 492 F.2d 1003 (7th Cir. 1974); *Calvin v. Rupp,* 471 F.2d 1346 (8th Cir. 1973); *Lipp v. Board of Education,* 470 F.2d 802 (7th Cir. 1972).

[8]In its preamble to the Age Discrimination in Employment Act of 1967, Congress found:

> "(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;
>
> (2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;
>
> (3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave; . . ." 29 U.S.C. §621(a).

fact that, for the average worker, such devices replace only a fraction of the income loss entailed by loss of employment. *See* Amicus Brief of the American Civil Liberties Union, *et al.*, on file herein.

Less obvious is the physical and emotional damage to an individual caused by deprivation of meaningful opportunities to work. In the language of the American Medical Association Committee on Aging:

> "Compulsory retirement on the basis of age will impair the health of many individuals whose job represents a major source of status, creative satisfaction, social relationships or self-respect. It will be equally disastrous for the individual who works only because he has to and who has a minimum of meaningful goals or interests in life, job related or otherwise. Job separation may well deprive such a person of his only source of identification, and leave him floundering in a motivational vacuum with no frame of reference whatsoever.

There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health. The practitioner with a patient load comprised largely of older persons is convinced that the physical and emotional ailments of many of these patients are a result of inactivity imposed by denial of work. Physicians generally agree that chronic complaints develop more frequently when a person is inactive and without basic interests. It is easy for

> the unemployed, unoccupied person to over-concern himself with his own normal physiological functions, and to exaggerate minor physical or emotional symptoms."[9]

Consequently, it can hardly be gainsaid that the magnitude of the deprivation attendant upon involuntary retirement is great. When involuntary retirement is the result of governmental action certainly, as a general principle, an individual faced with such a drastic measure must, under the Fourteenth Amendment, be given an appropriate hearing to determine if it is justified in fact. Perhaps exceptions exist[10] but, as will be developed below, no such exception exists with respect to the appellee.

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[9]*See Retirement, A Medical Philosophy and Approach,* AMA Committee on Aging, pages 2, 3, attached hereto marked Exhibit "B". Your amicus respectfully asks the Court to take judicial notice of the facts contained therein. Judicial notice has been frequently taken of undeniable human characteristics. *Ber v. Celebrezze,* 332 F.2d 293 (2d Cir. 1964); *Lykes Bros. SS Co. v. Boudoin,* 211 F.2d 618 (5th Cir. 1954); *rev'd on other grounds* 348 U.S. 336 (1955); *Atlantic Coast Line R. Co. v. Coleman,* 182 F.2d 712 (5th Cir. 1950); *Carter v. Campbell,* 179 F.Supp. 359 (N.D. Tex. 1959); *Cronenberg v. United States,* 123 F. Supp. 693 (E.D. N.C. 1954).

[10]The relationship between advancing age and productivity in general, as well as with respect to specific tasks or jobs, is a study which is in its infancy and the evidence is, by any objective standard, fragmentary. *See Hodgson v. Greyhound Lines, Inc.,* 354 F.Supp. 230 (N.D. Ill. 1973), *rev'd* 499 F.2d 859 (7th Cir. 1974); *Spurlock v. United Airlines, Inc.,* 475 F.2d 216 (10th Cir. 1972); *Airline Pilots Association, International v. Quesada,* 276 F.2d 892 (2d Cir. 1960). With respect to certain occupations, at least until further scientific data is available, individualized determinations of skill and ability may not be feasible. However, it is submitted, a strong showing would be required before the usual requirements of procedural due process could properly be dispensed with.

IV.

The Decision of the Lower Court Was Correct Because the Proof Demonstrated the Absence of Any Valid Basis for Dispensing With a Hearing at Which the Appellee Would Have an Opportunity, Consistent With the Constitution, to Show His Ability to Continue Satisfactorily Performing the Duties of a Uniformed Police Officer.

Interwoven in the lower court's decision are both procedural due process and equal protection concepts. In fact, and with respect to the present issue, the two are inseparable. If employment *per se* were not clothed with procedural due process safeguards, the question remaining would be whether the age-based classification resulting from the mandatory retirement law were rational, *see Reed v. Reed,* 404 U.S. 71 (1971); suspect, *see Frontiero v. Richardson,* 411 U.S. 677 (1973); or subject to strict scrutiny, *see Shapiro v. Thompson,* 394 U.S. 618 (1969). Although the lower court used language relevant to the Equal Protection Clause, it is submitted that it actually found the non-existence of such an issue when it held that "plaintiff has at least a recognizable interest in retaining his employment which the state cannot deny arbitrarily and irrationally;" and that, under the circumstances, an appropriate hearing was required.[11]

[11]Two lower federal courts failed to perceive the procedural due process question presented by mandatory retirement laws or policies and also found that the equal protection clause of the Fourteenth Amendment was not implicated. *Weiss v. Walsh,* 324 F.Supp. 75 (S.D. N.Y. 1971), *aff'd,* 461 F.2d 846 (2d Cir. 1971), *cert. den.* 409 U.S. 1129 (1973); *Armstrong v. Howell,* 371 F.Supp. 48 (D. Neb. 1974); *cf. Retail Clerks Union, Local 770 v. Retail Clerks International Association,* 359 F.Supp. 1285 (C.D. Cal. 1973); *Cookson v. Lewistown School District,* 351 F.Supp. 983 (D. Mont. 1972). One decision which upheld the mandatory retirement of state policemen at the age of 60 did not even consider the existence of federal constitutional issues. *McIlvanie v. Pennsylvania State Police,* 296 A.2d 630 (Pa. 1972), *dismissed for want of substantial federal question,* 415 U.S. 986 (1974), and one court dismissed a suit challenging the constitutional validity of the 70-year-old mandatory retirement law affecting federal civil servants for lack of a substantial federal question, without considering the merits. *Weisbrod v. Lynn,* 383 F.Supp. 933 (D. D.C. 1974), *aff'd without opinion,* 421 U.S. 940 (1975).

Thus, as a procedural due process issue, mandatory retirement has received little or no judicial attention.

In *Weinberger v. Salfi,* 422 U.S. ...., 43 L.W. 4985 (June 25, 1975), this Court pointed out the distinction between laws affecting "liberties protected by the due process clause of the fourteenth amendment" ("basic civil rights of man"), 43 L.W. at 4991, 4992, and laws containing mere classifications affecting the receipt or denial of non-contractual government benefits. In the case of the former, because of the magnitude of the deprivation potentially involved, procedural due process requires that the factual basis for the deprivation be fairly established. *Cleveland Board of Education v. LaFleur,* 414 U.S. 632 (1974); *Stanley v. Illinois,* 405 U.S. 645 (1972). With respect to the latter, the government is free to classify as it wishes provided, of course, no chilling effect is imposed upon the exercise of other express or implicit constitutional rights. *E.g., Shapiro v. Thompson, supra; Sherbert v. Verner,* 374 U.S. 398 (1963).[12] For reasons stated earlier, "the freedom to earn a living in the common occupations of life" is a liberty protected by the due process clause of the Fourteenth Amendment and is therefore immune

[12]In addition, under certain circumstances a classification will be disfavored when, along with lacking any rationality, it singles out and, in effect, punishes unpopular classes of people such as illegitimates or "hippies." *Jimenez v. Weinberger,* 417 U.S. 628 (1974); *United States Dept. of Agriculture v. Moreno,* 413 U.S. 528 (1973).

from classifications representing legislative or executive judgments concerning the age at which that freedom can be taken away.[13] The magnitude of the deprivation requires that a factual basis for the action be fairly established.

The question remaining is whether, under the facts of the instant case, any justification exists for depriving the appellee of an opportunity to demonstrate, factually, his ability to continue serving as a uniformed policeman. In the language of the lower court:

> "Individual testing is not impracticable but, rather, is already the order of the day. There is no suggestion that it is more burdensome to examine an officer at age 50 than it was at age 49. We must look, therefore, in another direction for reasonableness—is there, for example, a greater risk at the higher age that the test, or more exactly, the prognosis based upon testing, will be less reliable? . . .
>
> So far as appears, no study has been conducted of any kind. While there has been a compilation of certain statistics, from defendants' standpoint they are counter-productive. Not only did no expert testify to any significance in age 50 in a group which, by hypothesis, had individually passed annual tests during the preceding decade, but statistics of actual experience forecast no immi-

[13]Of course, age based classifications are both necessary and appropriate in settings where less important interests are involved, such as voting, jury eligibility, service in the armed forces and classifications for tax exemptions. *Oregon v. Mitchell*, 400 U.S. 112 (1970); *United States v. Duncan*, 456 F.2d 1401 (9th Cir. 1972), *vacated on other grounds*, 409 U.S. 814; *Smith v. United States*, 424 F.2d 267 (9th Cir. 1970); *Scarangella v. Commissioner*, 418 F.2d 228 (3rd Cir. 1969).

> nent change. The statistics furnish no reason to suppose that age 50 is within, or even significantly approaching a range where changes of conditions warrant a change of treatment. Rather, they contradict it."

Because of these findings, it is submitted, there is no permissible basis for denying appellee a hearing, consistent with due process, to determine his ability to continue to perform the duties of a policeman.

Conclusion.

The basic contention of your amici is that the freedom to work is a "liberty" within the procedural due process guarantees of the Fourteenth Amendment. All constitutional guarantees, including the right to work for a living, are necessarily qualified by the police power of a state. Because of the fundamental nature of the interest involved, however, any substantial restriction must be justified by a demonstrable governmental interest.[14] The factual relationship between advancing age and delining productivity is a study in its infancy and much more needs to be learned; it is undeniably

[14]Implicit in all that has been said above is the fact that there is a distinction between *involuntary* retirement and voluntary retirement pursuant to a pension or profit sharing plan, voluntary retirement for reasons of health, and voluntary retirement because one is tired of working and desires to relax and receive his Social Security benefits. The number of people who do not wish to retire at a particular age singled out by a mandatory retirement statute or policy has been the subject of study and figures are available. *See Amicus Brief of A.C.L.U., et al.* Your amicus does not contend that all employees must prove they are unable to work before they are permitted to retire. On the contrary, the constitutional issue is relevant only to those workers who can and wish to work beyond an age specified in a pension or retirement plan, or a law, and to forego any retirement benefits until cessation of work is either desired or necessitated by advancing age or declining physical or mental health.

true that the relationship between chronological age and functional age varies from individual to individual. It may well be that, with respect to certain occupations and professions, accurate tests of productivity or ability are not feasible and some other judgmental standard must be substituted. Nevertheless, for most tasks, accurate and reliable means for individualized evaluations either exist or will surely be developed in the future. Therefore, the constitutional implications of mandatory retirement are, at this point, difficult to precisely define. It is submitted, however, that under the facts of the instant case the judgment of the lower court was correct and should be affirmed.

Dated: Washington, D.C., August 27, 1975.

Respectfully submitted,

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EXHIBIT A.

CONSENT FOR FILING A BRIEF AMICUS CURIAE ON BEHALF OF THE APPELLEE ROBERT D. MURGIA PURSUANT TO SUPREME COURT RULE 42

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1974

NO. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary for the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellants

V.

ROBERT D. MURGIA,

Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

The undersigned parties in the pending case *Massachusetts Board of Retirement v. Murgia,* No. 74-1044 hereby assent to the filing of a brief *amicus curiae*

on behalf of the Appellee, Robert D. Murgia, by National Senior Citizens Law Center, Robert B. Gillan, Director [of Litigation.]

/s/ Terence P. O'Malley
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Dated: July 18, 1975

Consent for Filing a Brief Amicus Curiae on Behalf of the Appellee Robert D. Murgia Pursuant to Supreme Court Rule 42.

In the Supreme Court of the United States. October Term, 1974.

Commonwealth of Massachusetts Board of Retirement; Robert Q. Crane, Angelo Amato and J. Joseph Maloney, Jr., as They are Members of the Commonwealth of Massachusetts Board of Retirement; James W. Callanan, Executive Secretary of the Commonwealth of Massachusetts Board of Retirement; and John F. Kehoe, Jr., Commissioner of Public Safety of the Commonwealth of Massachusetts, Appellants v. Robert D. Murgia, Appellee. No. 74-1044.

On Appeal from the United States District Court for the District of Massachusetts.

The undersigned parties in the pending case *Massachusetts Board of Retirement v. Murgia* No. 74-1044 hereby assent to the filing of a brief amicus curiae on behalf of the Appellee, Robert D. Murgia, by the American Association of Retired Persons and the National Retired Teachers Association, by Stephen Solomon, Esq., Miller, Singer, Michaelson, Brickfield and Raives.

/s/ Terence P. O'Malley
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Dated: August 11, 1975

EXHIBIT B.

Retirement—A Medical Philosophy & Approach.

FOREWORD

The AMA Committee on Aging is convinced that a sense of purpose and the opportunity to contribute to the well being of others are as vital to an individual's health as are adequate medical care, nutrition or rest. For this reason, the Committee is deeply concerned with policies which call for arbitrary retirement based on chronological age, without regard to individual desires and capabilities.

This paper summarizes the Committee's convictions as to the negative health effects of such compulsory job separation. It also suggests a medical system for determining physical and mental fitness for continued employment; a system which can be applied periodically over the employee's entire work life.

This paper does not attempt to discuss the social and economic factors which also bear on the question of retirement; it represents simply the medical philosophy of the Committee toward conservation and utilization of our most precious resource—human beings.

/s/ Frederick C. Swartz, M.D.
Frederick C. Swartz, M.D.
Chairman, Committee on Aging

A. Medical Viewpoint

The increase in life expectancy and higher health levels will prove of little benefit to man if he is denied the opportunity to continue contributing of his skills at a certain chronological age, whether this be 45, 65 or 85 years.

It is the conviction of the American Medical Association Committee on Aging that such arbitrary retirement and denial of work opportunity—whether the work is for pay or the pleasure of giving—seriously threatens the health of the individual concerned. By way of emphasis, when we speak of "retirement" in this paper, we mean the complete separation of the man from his job.

Medicine, "the oldest of the professions in the sense that it comprises a group of men who not only share a common training in the relevant sciences and arts, but who also have adopted a code of practice and obligated themselves to perform a service to their fellow men," sees in retirement a direct threat to the health and life expectancy of the persons affected.

Medicine, more than any other discipline, is that knowledge which exists totally for the service of mankind. In the rendering of this service, the basic philosophy has always been to do good, and to do no harm. No matter where we start in the cycle of a generation, the aim of medicine has been to prolong living, to reduce and eliminate suffering, and—above all—to save lives.

The gnarled, runty, deformed child, the acutely and chronically ill, and the handicapped disabled oldster are the highest objects of medical attention, for within these warped receptacles resides that spark of infinity termed life.

The well and healthy are the concern of medicine for the same reason, for there is still much to be done before the race can be perfected. Every effort is made to assist each individual to achieve his maximum potential, to utilize his abilities for his own and the human community's greatest benefit.

From the beginning of life until its end, these objectives and motivations should continue to apply. Unfortunately, they apply only until a certain chronological age—most often 65—when forces outside of medicine inflict a disease—or disability-producing condition upon working men and women that is no less devastating than cancer, tuberculosis, or heart disease. This condition—enforced idleness—robs those affected of the will to live full, well-rounded lives, deprives them of opportunities for compelling physical and mental activity, and encourages atrophy and decay. It robs the worker of his initiative and independence. It narrows physical and mental horizons so much that the patient's final interests and compulsions are in grumbling about his complaints.

This condition has brainwashed thousands into the belief that at 65 one is over the hill. It has imposed the philosophy of the marketplace on the employee—a philosophy that substitutes, at an arbitrary chronological age, the concept "throw out all of the old and defective" for the dictum "to do good and to do no harm."

For these reasons, medicine is compelled to oppose retirement keyed to any chronological age, as detrimental to the best interests of the employee. To do otherwise would be to lose all to those who would gradually lower the age of these so-called retirement criteria

until they would be applied at birth. The gnarled, the runty, the defective, like the gnarled, runty apples and oranges, would be graded out in the beginning. This approach might make medicine of the future more simple, but it would certainly separate the "art" of medicine from the "science."

It is true that persons who have maintained broad interests throughout life and are financially secure could quite conceivably enjoy and benefit from the years following retirement. Insofar as these individuals continue to give of their abilities to others—insofar as their life still has a purpose other than self-gratification—they cannot be called "retired" in any real sense. They have re-directed rather than relinquished their channels for contribution.

The majority of persons, unfortunately, do not fall in this category. Compulsory retirement on the basis of age will impair the health of many individuals whose job represents a major source of status, creative satisfaction, social relationships or self-respect. It will be equally disastrous for the individual who works only because he has to, and who has a minimum of meaningful goals or interests in life, job-related or otherwise. Job separation may well deprive such a person of his only source of identification, and leave him foundering in a motivational vacuum with no frame of reference whatsoever.

There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health. The practitioner with a patient load comprised largely of older persons is convinced

that the physical and emotional ailments of many of these patients are a result of inactivity imposed by denial of work. Physicians generally agree that chronic complaints develop more frequently when a person is inactive and without basic interests. It is easy for the unemployed, unoccupied person to over-concern himself with his own normal physiological functions, and to exaggerate minor physical or emotional symptoms.

The physical and mental health of an individual can be affected by loss of status, lack of meaningful activity, fear of becoming dependent, and by isolation.

Compulsory retirement produces a chain reaction in the health of such persons. It is a fact that the working man finds it difficult to accept the feeling of no longer being needed on the job. He loses contact with his work associates—many of whom may have been his closest friends—and is thrown back on the family.

Here, having a lesser part to play, he may experience loss of dignity and status. This is particularly so if his contributions to the family social circle previously have revolved solely or primarily around a recounting of his job experiences. The individual who has developed virtually no interests outside of those connected with his paycheck, who does not keep up with community affairs or dress up as he did when working, who can offer little to the family circle except his presence underfoot for 24 hours a day, may soon find himself isolated from the family itself. While isolation, per se, does not cause illness, it increases the chances of physical or emotional disturbance. It may also activate underlying neuroses, contribute to obesity and alcoholism and even precipitate an underlying tendency to suicide.

Vital Statistics of the United States and other sources report that suicides reach a peak in upper age brackets —after retirement normally occurs. The highest incidence of suicide for white males occurs in the age group 70 years and over; for non-white males in the age group 60 and over. There is also a tendency for the person who commits suicide to do so after being isolated from society.

There may also be direct physical sequelae to the abrupt change in activity patterns. The nice nutritional adjustment to work which many individuals develop may be set awry on retirement. The person whose physical and mental exercise has been solely or primarily connected with earning a living may exhibit a progressive disuse atrophy following job separation.

Whatever may be the precise percentage adversely affected by retirement, and physicians are convinced it is high, it is ill-advised to create additional problems for people by arbitrarily denying them one of mankind's principal avenues for self-satisfaction. For these reasons, the Committee on Aging decries the practice of retirement by the calendar without regard to individual capabilities or motivation.

B. Suggested Approach

It is the conviction of the Committee that any decision for or against retirement should rest on the same three fundamentals as does a decision for or against hiring:

(1) the individual's desire to work;

(2) the individual's ability to work; and

(3) the employer's need for the skill or ability which the individual offers—or is potentially able to offer.

These fundamental criteria would be applied at the time of employment, would operate over the employee's entire work life with the firm, and could form the basis for a decision *at any time during this work life* for or against job reassignment, job retraining or job separation—whether in the form of retirement or dismissal.

Many of the reservations expressed about such individualized placement and retirement programs revolve around the second criterion listed above—the individual's ability to continue work—and around the development of methods by which to accurately measure this ability. Accordingly, this paper will attempt to (a) list some of the specific physical and mental characteristics which might be measured in assessing capability for continued work, and (b) suggest a general system for applying such measurements.

It should be re-emphasized that these measurements are not designed to be held "in abeyance" until a certain chronological age, and then applied periodically thereafter, but to be utilized at regular intervals throughout the employee's work life. As such, they may well assist in identifying the individual who should be replaced at 50 as well as one still capable at 90. The individual's physical and emotional status would dictate the frequency of such evaluations, and their results would of course be confidential between employee, employer and physician.

If such an individualized retirement system is to function with optimum effectiveness and benefit to both employee and employer, the firm involved will need to think in terms of hiring and utilizing an employee for his entire work life *potential* rather than just to fill

a particular position or slot currently open in the organization. The firm will need to evaluate—and re-evaluate—an employee's capabilities not only for the position currently being filled, but for positions which may become available in the future. Such a personnel policy will be *employee- rather than job-centered,* and will entail greater attention to job analysis, employee training and re-training, and counseling programs within the firm.

Periodic evaluation of the employee's capabilities over his entire work life will be important in providing a base line from which to evaluate physical and mental capabilities at any time he is considered for retirement or job reassignment. Continuous employee counseling, too, will be an integral part of such a system, for a number of reasons. Counseling will be needed because a fluid rather than fixed separation date might otherwise find the worker unprepared emotionally, socially or financially. Individual interpretation may be needed to appropriately prepare the worker when retirement seems desirable. In cases where retirement is indicated, such counseling might delineate the other factors in addition to the individual's capabilities which would influence the decision for or against retirement, and thus help avoid his taking dismissal as a "failure to measure up." On the other hand, counseling may be needed in some instances to persuade an employee to *continue* working, when his own and the company's interests so indicate. Finally, counseling will be important in those cases where continued employment involves an adjustment in work status, pay and prestige for the employee. This may occur because of a decline in the employee's capabilities, or because of a decline in need for the employee's capabilities.

There is no attempt here to imply that the employer owes a greater responsibility to older workers than he does to those in any other age group. It would obviously be unrealistic, for example, to urge an employer to retain an older worker—no matter how highly proficient—if there were no further possible way of utilizing that worker's contribution or potential contribution. It is assumed, however, that employment and retirement practices would be based on conservation and fullest possible utilization of existing manpower—by selecting, placing, promoting and retraining employees on the basis of qualifications for the job. It is assumed also that employee training, re-training and counseling programs will assist the firm in achieving this objective.

Further, under the type of continuous program proposed in this report, the employee no longer needed in one firm may well secure quick employment in another, on the strength of the data developed on his capabilities and potentials over the years.

C. Medical Evaluation

Basically, evaluation of an individual's capability for a particular job, whether his present position or an alternative available opening, would consist of matching an "Employee Profile" of those physical and mental capabilities susceptible to change over his work life, with a "Job Profile" of the same physical and mental requirements, using identical gradations for comparability. The following section lists some of the specific criteria which might be included in the Employee and the Job Profiles. *It should be emphasized that this list of criteria is not all-inclusive or exclusive; nor are the gradations specified necessarily the most meaningful.*

*The material is intended only to be suggestive of an over-all system for making such evaluations.**

1) Physical Criteria
   - Strength and endurance .....(S)
   - Mobility—range of motion .....(M)
   - Dexterity .....(D)
   - Coordination .....(C)
   - Vision .....(V)
   - Hearing .....(H)
   - Equilibrium .....(E)

The first four characteristics might be evaluated separately for:

- Forearm and hand .....(F)
- Upper extremities—upper arm, shoulder girdle and back .....(U)
- Lower extremities—feet, legs pelvic girdle and lower back .....(L)

2) Mental Criteria
   - Concentration .....(C)
   - Analytical ability .....(A)
   - Judgment .....(J)
   - Flexibility .....(F)
   - Initiative .....(I)
   - Ability to work effectively with others .....(P)

A numerical gradation or scale could then be established for each of the above criteria. For example, under (S)—Strength and endurance—a scale of 1 through 4 might be established as follows:

1—Able to perform maximum sustained effort over long periods

*Adapted from the U.S. Army Physical Profile Serial system, (PULHES), used to assess the functional ability of individuals to perform military duties.

2—Able to perform sustained effort over long periods

3—Able to perform sustained effort over moderate periods

4—Unable to perform sustained effort

Similar gradations would be established for other criteria.

Using this system, a "Job Profile" would be established for each position under consideration, and would be reviewed periodically in the light of changing requirements within the firm. Thus, a hypothetical Job Profile of requirements for the position of tool and die maker might look somewhat as follows:

Physical

S (Strength and endurance) .....
(F-2) (U-2) (L-3)

M (Mobility—range of motion) .....
(F-1) (U-1) (L-2)

D (Dexterity) .....
(F-1) (U-1) (L-3)

C (Coordination) .....
(F-1) (U-1) (L-3)

V (Vision) 1

H (Hearing) 3

E (Equilibrium) 1

Mental

C (Concentration) 1

A (Analytical ability) 1

J (Judgment) 3

F (Flexibility) 2

I (Initiative) 3

P (Ability to work effectively with others) 3

A comparable Employee Profile would then be developed and updated periodically thereafter for the individual, through an evaluation of his physical and mental capabilities by his own and the plant physician, combined with a rating by his supervisor and the personnel department on certain aspects of the Profile. Many of the Employee Profile capabilities—mobility, strength and endurance, for example—will require and be directly susceptible to objective medical evaluation; others such as analytical ability, judgment, ability to work effectively with others, etc., may be more amenable to rating by the supervisor or personnel department, or to measurement by testing procedures. The methods for measuring various facets of the Employee Profile will need to be worked out in detail, utilizing accepted testing and evaluation procedures as far as possible. The methods developed should be generally standardized and accepted between different employers, to permit comparability of results.

Of particular importance in periodic evaluation of the more "intangible" capabilities such as flexibility, judgment, and the like will be a concurrent assessment of employee *motivation*, in order to distinguish between decline in these capabilities, and a decline in *desire to use* these capabilities. This is more than an academic distinction, since it may make the difference between retirement—for cause outside the employee's control—and separation—for cause within the employee's control.

To offset normal variations in employee performance from one day to the next, as well as the fluctuation resulting from increased motivation at the time of testing, it would probably be advisable to evaluate some of

the employee characteristics over a period of time, rather than at a particular point in time. A periodic comparison of Job and Employee Profiles would then provide some quantitative frame of reference from which to consider the individual's suitability for continued employment.

No attempt is made in this report to suggest a minimum rating level below which the employee would be disqualified for continued employment. It would be fallacious to presume that simple comparison of Employee Profile with Job Profile will provide a cut-and-dried answer in itself; additional factors will influence the decision as to what constitutes an acceptable "score" on the Employee-versus-Job Profile.

The physician, in making a recommendation for or against continued employment on the basis of health, will have to consider not only the individual's present physical capabilities for the job in question, but also the presence of currently non-disabling physical or mental disorders which might be exacerbated by job demands. Other factors needing consideration include the individual's potential for training or re-training in alternative job skills, the importance of work as a source of status for the individual, and the extent to which mental health will be fostered by continued employment.

The employer will want to consider not only the physician's recommendation, the demand for skills of the employee under consideration, the firm's investment in the employee, and his current and predicted job performance, but also his potential value to the firm in future years, in terms of new products or services to be developed.

In the final analysis, it is the Committee's conviction that the decision for or against retirement, just as the decision for or against hiring, should be an individual one, in terms of a specific employee, in a specific firm, at a specific time.

Supreme Court, U. S.
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No. 74-1044

In The Supreme Court of The United States

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

AMICUS CURIAE BRIEF OF LIEUTENANT LAWRENCE CARTER, CAPTAIN RAYMOND M. McGUIRE AND CAPTAIN WILLIAM F. READY IN SUPPORT OF APPELLEE.

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AMICUS CURIAE BRIEF OF LIEUTENANT LAWRENCE CARTER, CAPTAIN RAYMOND M. McGUIRE AND CAPTAIN WILLIAM F. READY IN SUPPORT OF APPELLEE.

PRELIMINARY STATEMENT

Pursuant to Supreme Court Rule 42, consent of the parties having been obtained, Lieutenant Lawrence Carter, Captain Raymond M. McGuire and Captain William F. Ready file this Brief as Amicus Curiae in Support of Appellee.

QUESTION PRESENTED

Whether Mass. Gen. Laws ch. 32, § 26(3)(a) mandating retirement of members of the Uniformed Branch of the Massachusetts State Police at age 50 is constitutional?

STATEMENT OF INTEREST OF AMICUS CURIAE

Lieutenant Lawrence Carter, Captain Raymond M. McGuire and Captain William F. Ready are members of the Uniformed Branch of the Massachusetts State Police; each of them has served at least twenty years creditable service with the Uniformed Branch and has passed his fiftieth birthday, thereby becoming eligible for superannuation retirement under Mass. Gen. Laws ch. 32, § 26(3)(a), the statute challenged by Appellee in these proceedings.

The Massachusetts Board of Retirement sent each of these officers a form letter at least sixty days prior to his fiftieth birthday reminding him of the mandatory retirement of members of the Uniformed Branch at age 50 and providing him with information concerning optional voluntary retirement before reaching the mandatory age.

At the time of receipt of this letter, each officer had passed the re-enlistment physical examination performed annually upon all uniformed officers aged 40 or over and had been pronounced fit to perform all the duties required of members of the Uniformed Branch.

Lieutenant Carter and Captains McGuire and Ready individually sought and successfully obtained court orders restraining the Massachusetts Board of Retirement and the Department of the Attorney General from enforcing the

mandatory retirement statute, found unconstitutional by a three-judge panel of the United States District Court for the District of Massachusetts in *Murgia* v. *Massachusetts Board of Retirement*, 376 F. Supp. 753 (D. Mass. 1974).[1] As a result, each officer is continuing service under court order in the same capacity as that in which he served before reaching age 50; Captain McGuire and Lieutenant Carter are respectively Commander and Assistant Commander of Troop D, Middleborough; Captain Ready is Personnel and Recruitment Officer, Framingham.

The interest of Amicus Curiae in the mandatory retirement statute is clear. Enforcement of the statute will foreclose from these men the opportunity to continue their careers at a time when they have been pronounced fit to continue performance of all the duties required of uniformed officers and when they possess the experience and skill demanded of those occupying responsible command positions.

STATEMENT OF THE CASE AND JURISDICTION

Lieutenant Lawrence Carter, Captain Raymond M. McGuire and Captain William F. Ready, as Amicus Curiae, hereby adopt the Statement of the Case of Appellee, as well as Appellee's Statement of Jurisdiction.

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[1] *Carter* v. *Commonwealth*, Civil No. 74-487 (Plymouth Sup. Ct., Oct., 1974); *McGuire* v. *Commonwealth*, Civil No. 1330 (Bristol Sup. Ct., March 21, 1975); *Ready* v. *Commonwealth*, Civil No. 758 (Bristol Sup. Ct., Dec. 5, 1974).

ARGUMENT

I. CLASSIFICATION BASED SOLELY ON THE SUSPECT CRITERION OF AGE AND AFFECTING THE FUNDAMENTAL RIGHT TO GAINFUL EMPLOYMENT MUST BE SUBJECT TO STRICT JUDICIAL SCRUTINY.

Classifications based solely upon age possess many characteristics common to classifications heretofore characterized as suspect by the Supreme Court. Like classifications which discriminate on the basis of race, classifications discriminating on the basis of age have a long and unfortunate history in the United States. In the Commonwealth of Massachusetts, for example, these classifications originated almost a century ago with the passage of a civilian retirement and pension plan for the City of Boston, Act of May 14, 1878, ch. 244, § 5 [1878] Mass. Acts and Resolves 201. Massachusetts has not acted alone in the area. The snowball effect of similar statutes throughout the United States has worked to significantly reduce the percentage of older workers on the labor force.[2] Today, as a result of the widespread acceptance of mandatory retirement, older workers face pervasive discriminiation in employment.[3]

Age, like race, illegitimacy and national origin, is an immutable characteristic determined solely by the accident of birth. Classification of individuals based on such characteristics would seem to violate, as it did in the case of classification of individuals on the basis of the legitimacy of their

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[2] Gordon, M. S., *The Older Worker and Retirement Policies,* 83 Mo. Law Rev. 577 (1969).

[3] *Too Old To Work: The Constitutionality of Mandatory Retirement Plans,* 44 S. Cal. L. Rev. 150 (1971).

births, "the basic concept of our system that legal burdens should bear some relationship to individual responsibility ...." *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175 (1972).

Both Congress and the Massachusetts Legislature have recognized the inherently suspect nature of classifications based solely on age where individuals are between the ages of 40-65.[4] Each statute imposes a heavy burden on the employer, be it a private company or state agency, to justify any practice which discriminates against a covered employee on the basis of his age. The Court should not underestimate the significance of this legislatively-imposed burden of proof when scrutinizing other acts of the Legislature and, as it were, putting the State to its burden of proof. Cf. *Frontiero* v. *Richardson,* 411 U.S. 677, 687-688 (1972); *Oregon* v. *Mitchell,* 400 U.S. 112, 240, 248-249 (1970) (opinion of Brennan, White, and Marshall, J.J.); *Katzenbach* v. *Morgan,* 384 U.S. 641, 648-649 (1966).

Where the aged-based classification burdens the exercise of a right as fundamental to the individual as the right to gainful employment, strict judicial scrutiny is particularly appropriate.

The effects of mandatory retirement to both the individual and the society are staggering. In the case of the Appellee, he is forced to adjust to living on approximately one-half his former income at a time when the financial demands placed upon him as family wage-earner are at their peak. Lieutenant Carter and Captains McGuire and Ready would suffer the same fate if the statute is upheld.

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[4] Age Discrimination in Employment Act, *as amended* 29 U.S.C. §§ 621-634 (1974); Mass. Gen. Laws ch. 151 B, *as amended* (1972).

At the same time, the Commonwealth incurs the expense of paying out the Appellee's pension and paying his replacement while losing the services of a capable and experienced leader. The cost to the Commonwealth of the age 50 mandatory retirement of uniformed officers is high.[5]

The fundamental nature of the right to gainful employment has long been recognized by the Court. *Dent* v. *West Virginia,* 179 U.S. 114 (1888); *Truax* v. *Raich,* 239 U.S. 33 (1915); *Meyer* v. *Nebraska,* 268 U.S. 390 (1923). The Court in *Meyer* v. *Nebraska* placed this right in the same context with the fundamental rights to freedom of religion and privacy.

> While this court has not attempted to define with exactness the liberty . . . guaranteed [by the Fourteenth Amendment] the term has received much consideration and some of the included things have been definitely stated. Without doubt, it denotes not merely freedom from bodily restraint but also the right of the individual to contract, *to engage in any of the common occupations of life,* to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized . . . as essential to the orderly pursuit of happiness by free men. (emphasis supplied) *Id.* at 399.

In reviewing legislative classifications which burden the

[5] It has been estimated that an increase in the mandatory retirement age from 50 to 55 would result in a $120,000 saving the first year, with a total saving of $1,185,000 after five years. McLaughlin, Richard E., Plan for Reorganization of the Executive Office of Public Safety (hereinafter Plan for Reorganization), at 3 (Jan. 18, 1973).

exercise of fundamental rights or which create suspect classifications the Court has applied a strict standard of review. *Eisenstadt* v. *Baird,* 405 U.S. 438 (1972); *Shapiro* v. *Thompson,* 394 U.S. 618 (1969); *Skinner* v. *Oklahoma,* 316 U.S. 535 (1942). Under this test, such classifications, unless shown to be necessary to promote a compelling governmental interest, are unconstitutional. *Shapiro* v. *Thompson, supra* at 634.

When measured against this standard, the mandatory retirement statute fails to pass muster.

The Appellants assert two objectives of the mandatory retirement statute: the maintenance of an effective governmental service, and the provision of material support for the individual retiring worker. Brief for Appellant at 16. While Amicus Curiae recognizes these as worthy goals, it submits that neither articulated purpose can be called compelling. Further, it is clear that mandatory retirement of members of the Uniformed Branch of the State Police is not necessary to promote these governmental interests. Where a uniformed officer has been pronounced fit to perform all of the duties required of him, how can his mandatory retirement be said to promote the effectiveness of the State Police? Where mandatory retirement forces an individual to live on approximately half his previous income at a time when he is capable of performing his job and earning a full salary, how can his mandatory retirement be said to provide for his material support? Accordingly, the Court should hold that the Massachusetts retirement statute for its uniformed State Police officers is not necessary to promote a compelling governmental interest.

II. THE MASSACHUSETTS RETIREMENT STATUTE CREATES AN IRREBUTTABLE PRESUMPTION OF UNFITNESS OF UNIFORMED OFFICERS AGED 50 IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT.

The Commonwealth has the undeniable right to refuse uniformed officers re-enlistment if they fail to meet the qualifications set out for members of the Uniformed Branch. However, the Commonwealth cannot, consistent with due process, refuse re-enlistment to all uniformed officers at age 50 on the basis of a statutory presumption that the officers become unfit at that age.

The Due Process Clause of the Fourteenth Amendment limits the power of states to terminate an entitlement, whether that entitlement is determined a "right" or a "privilege." *Goldberg* v. *Kelly*, 397 U.S. 354 (1970). Where law, rules or regulations establish in an employee something beyond a mere expectancy in the continuation of his employment, his "right" to retain that employment is a "property right" protected by the Due Process Clause. *Board of Regents* v. *Roth*, 408 U.S. 564 (1972). Members of the Uniformed Branch of the Massachusetts State Police have such a property right in their jobs created by statute. Mass. Gen. Laws ch. 22, § 9A. The Appellee's substantial interest in retaining his employment has already been recognized. *Murgia* v. *Massachustts Board of Retirement*, at 754.

The Commonwealth, on the other hand, can point to no such substantial interest in retiring members of the Uniformed Branch at age 50 without an individualized determination of fitness, the two objectives advanced by Appellant in support of the mandatory retirement statute notwithstanding. In fact, the retirement statute lacks a rational basis in furthering *any* substantial state interest. *Id.* at 754.

This lack of rationality is clear when one studies the functioning of the system. Under State Police Regulations, each member of the Uniformed Branch is given a re-enlistment physical examination annually from age 40 on. (A. 146). Re-enlistment is contingent upon passing this examination. As a result of the testing of each officer annually as he approaches age 50 and the retirement of those failing to pass the physical examination, *all* those officers still with the State Police at age 50 are fit to perform all of the duties required of them, with the exception of a few individuals serving on disability waivers.[6] In view of this, how can the mandatory retirement of all officers at age 50 be said to rationally relate to providing a more effective State Police force?

The presumption of unfitness upon which the retirement statute is based is thus clearly not necessarily or universally true and is therefore violative of the Due Process Clause. *Vlandis* v. *Kline*, 412 U.S. 441 (1973); *Stanley* v. *Illinois*, 405 U.S. 645 (1972); *Cleveland Board of Education* v. *LaFleur*, 414 U.S. 632 (1974).

The Commonwealth is put to no additional burden by the requirement of individualized determinations of fitness for those aged 50 in place of the across-the-board determination of unfitness provided by the statute, since each uniformed

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[6] Rules and Regulations of the Government of Massachusetts State Police, rule 7.4, authorizes the Commissioner of Public Safety to waive any physical or mental defect. (A. 138).

At the present time there are approximately 10-12 members of the Uniformed Branch serving under disability waivers. (A. 160)

officer is tested annually for physical defects under the present system. Rather than retire all officers at age 50, the Commonwealth can treat officers aged 50 as it now treats all other uniformed officers, retiring those officers unable to pass the re-enlistment physical examination.

III. THE MASSACHUSETTS MANDATORY RETIREMENT STATUTE LACKS A RATIONAL BASIS IN FURTHERING THE ARTICULATED STATE PURPOSES.

Where the strict standard of review is inapplicable to a case, the constitutionality of a legislative classification under the Equal Protection Clause is determined by consideration of whether the statute "rationally furthers some legitimate, articulated state purpose . . . ." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 17 (1973); *McGinnis* v. *Royster,* 410 U.S. 263, 270 (1972).

Each time the legislature draws a line some individuals who might well have been included are left out; this is not objectionable under the Equal Protection Clause. *See Village of Belle Terre* v. *Boraas,* 416 U.S. 1 (1974); *Dandridge* v. *Williams,* 397 U.S. 471 (1970); *McGowan* v. *Maryland,* 366 U.S. 420 (1961). However, in order to meet the minimum test of rationality required of statutory classifications there must be a general relationship between the statute and the achievement of a legitimate state purpose. *San Antonio Independent School District* v. *Rodriguez, supra; McGowan* v. *Maryland, supra.*

Amicus Curiae does not argue that mandatory retirement laws in general are irrational or that provision of support to retired state employees through a pension scheme is irrational; Amicus Curiae only argues that mandatory retirement of uniformed officers of the Massachusetts State Police at age 50 is an irrational means of promoting or furthering these articulated state objectives.

The Commonwealth principally relies on its assertion that mandatory retirement at age 50 promotes the effectiveness of the State Police, effectiveness in the sense of physical ability and vigor. Brief for Appellant at 46. Amicus Curiae readily admits, as did the district court, that there is a general relationship between advancing age and decreasing physical ability. 376 F. Supp. at 755. This, however, is irrelevant to a determination of the rationality of the retirement statute, since the achievement of an effective state police force is not based on pure physical ability or on optimum physical capacity. The Commonwealth itself has determined the relevant physical parameters for purposes of the maintenance of an effective state police force by promulgating physical and medical standards for enlistment and re-enlistment. It is within these parameters that the rationality of the mandatory retirement statute must be determined. It is here that the total irrationality of the statute becomes clear.

State Police Regulations require each applicant for a position with the Uniformed Branch and each uniformed officer making a re-enlistment application to pass a physical examination. From the time a uniformed officer reaches age 40 he is subject to this examination annually, and is given additional tests as well.[7] Failure to pass this physical

[7] In addition to the tests usually included as part of the re-enlistment examination, those uniformed officers aged 40 and over are given an electrocardiogram and a test for gastrointestinal bleeding. (A. 148).

examination will result in an applicant's rejection or in the retirement of an active officer, unless he can obtain a disability waiver. By this process of selection only the fit survive. Therefore, with the exception of those now serving on disability waivers, those uniformed officers still active at age 50 are all fit to perform the duties of members of the Uniformed Branch, as fitness has been defined by the Commonwealth. *All* officers required to retire by the mandatory retirement statute have been examined within the twelve months prior thereto and pronounced fit.

Rather than serving to eliminate unfit men from the ranks of the State Police, the retirement statute deprives the State Police of the services of men continually found fit to perform, who have maturity which can only be gained through years of experience. It thus takes from the State Police the services of its most select and experienced group of officers. This is simply not rational in light of the articulated objective of the statute.

The statute is no more rationally related to the achievement of its second articulated objective: the provision of material support for the individual retiring worker. Brief for Appellant at 16. The operation of the statute forces uniformed officers into retirement at a set age; it in no way provides for their material support. An increase in the retirement age of uniformed State Police would not upset a complex retirement scheme. Instead, it would save the Commonwealth money[8] and allow individual officers to work additional years at full salary while building their retirement benefits with increased years of service.

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[8] McLaughlin, Richard E., Plan for Reorganization, supra.

CONCLUSION

For the reasons stated above, the order of the district court should be affirmed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellants*

v.

ROBERT D. MURGIA, *Appellee*

Brief Amici Curiae of the Older and Middle Age Worker Ombudsman Pilot Project of United Communities of Southeastern Philadelphia and of the Public Interest Law Center of Philadelphia In Support of Appellee

On Appeal from the United States District Court for the District of Massachusetts.

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IN THE

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OCTOBER TERM, 1974

No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT: ROBERT Q. CRANE, ANGELO AMATO and JOSEPH MALONEY JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT: JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT: and JOHN F. KEHOE, JR., COMMISSIONER of PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS, *Appellants*

v.

ROBERT D. MURGIA, *Appellee*

BRIEF AMICI CURIAE OF THE OLDER AND MIDDLE AGE WORKER OMBUDSMAN PILOT PROJECT OF UNITED COMMUNITIES OF SOUTHEASTERN PHILADELPHIA AND OF THE PUBLIC INTEREST LAW CENTER OF PHILADELPHIA IN SUPPORT OF APPELLEE

On Appeal from the United States District Court for the District of Massachusetts

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CONSENT TO FILING

This amicus brief is filed, pursuant to Supreme Court Rule 42(2), with the written consent of both parties to the case.

INTERESTS OF AMICI CURIAE

The Older and Middle Age Worker Ombudsman Pilot Project was organized in March, 1975, by United Communities of Southeast Philadelphia, with a grant from discretionary monies available under the federal Comprehensive Employment and Training Act to the Governor of the Commonwealth of Pennsylvania and its Department of Labor and Industry. United Communities is an association of five historic settlement houses serving ethnically diverse and aging neighborhoods along the Delaware River in Southeast Philadelphia. In 1940, for example, the 174,000 people of this part of the City had a median age of 26.5 years, and 23% of them were aged forty-five or over. By the 1970 Census, the median age of the 108,000 people living in the neighborhoods had increased to 31.6, and 36% of them were over forty-five. In 1940, 48% of the people over forty-five years of age in Philadelphia were in the labor force; by 1970, that figure had increased to 50.3%.[1]

In 1975, the recession aggravated the distress which unemployment imposes upon aging citizens, and United Communities founded the Older and Middle Age Workers Ombudsman Pilot Project to provide employment counseling and pension advice and to seek a wider distribution of jobs to the aging. In particular the Project seeks, wherever the Constitution and statute law extends, to eliminate discrimination in employment on grounds of age. The Project has counseled and represented individual aging citizens in these pursuits, and, because the lower court

1. U.S. Bureau of the Census, *16th Census of the United States: 1940, Population*, Vol. IV, Part IV, Pennsylvania Table 24, at p. 301 (Washington: U.S.G.P.O. 1943); *16th Census of the United States, Population and Housing, Statistics for Census Tracts, Philadelphia, Pa. Table 2* (Washington: U.S.G.P.O. 1942); *1970 Census of Housing and Population, Census Tracts, Philadelphia, Pa. S.M.S.A.*, Table P-1 (Washington: U.S.G.P.O. 1972); *Census of Population: 1970*, extract from Fourth Count Tape, prepared by Philadelphia City Planning Commission (1973).

in this case properly found the mandatory retirement of a fifty year old man unreasonable and invidious under the Constitution, the Project files this amicus brief to urge that the decision be affirmed.

The Public Interest Law Center of Philadelphia, a non-profit private corporation, was created in July, 1974, by the Philadelphia Bar Association in recognition of the Bar's obligation to provide counsel to unrepresented citizens in matters which significantly affect the public interest. In particular the Law Center provides representation in matters which cut across economic barriers and touch upon the interests of a broad sweep of the citizenry. Matters affecting the aging are among these as are matters affecting employment generally and the availability of jobs.

The Law Center has counseled the Older and Middle Age Worker Ombudsman Pilot Project and provided legal representation to individual aging citizens in employment cases. The Law Center, and its predecessor, the Philadelphia office of the Lawyers' Committee for Civil Rights Under Law, has also litigated several score race, sex, and national origin employment discrimination cases under Title VII of the Civil Rights Act of 1964, and is exploring the responsibilities of federal contractors under Section 503 of the Rehabilitation Act of 1973 to take affirmative action to employ the mentally and physically handicapped. Because the district court in this case properly required that continued employment be determined on a performance standard, undistorted by stereotype or thoughtlessness, the Law Center files this brief amicus curiae to urge that the decision be affirmed.

STATUTORY PROVISIONS INVOLVED

Massachusetts General Laws Ch. 32, Section 26(3) which is entitled "Retirement Upon Attaining Age Fifty-five or Expiration of Twenty Years of Service for Physical

or Mental Incapacity" (Michie 1973), provides in subsection a, in the part whose constitutionality is here in issue, as follows:

> Any member in service classified in Group 3 who is an officer appointed under section nine A of chapter twenty-two and who has performed service in the division of state police in the department of public safety for not less than twenty years, shall be retired by the state board of retirement upon his attaining age fifty or upon the expiration of such twenty years, whichever last occurs.

The text of the statute is found at page 492 of Annotated Laws of Massachusetts, Ch. 32, §26(3)(a) (Michie 1973).

Massachusetts General Laws, Ch. 32, §26(2), Ch. 32, §6(1), and Ch. 22, §9(A)(Michie 1973) also affect the issue here. Chapter 32, §26(2) (Michie 1973), entitled "Retirement for Physical or Mental Incapacity Caused by Illness or Injury Incurred in Performance of Duty," provides in subpart (a):

> (2) Retirement for Physical or Mental Incapacity Caused by Illness or Injury Incurred in Performance of Duty.-(a) Any member in service classified in Group 3 who is an officer of the division of state police in the department of public safety shall be retired by the state board of retirement in case the rating board, after an examination of such officer by a registered physician appointed by it, shall report in writing to the state board of retirement that such officer is physically or mentally incapacitated for the performance of duty by reason of (i), illness incurred through no fault of his own in the actual performance of duty, or (ii), an injury resulting from an accident occurring during the performance and within the scope of his duty and without contributory negligence on his part, and that such incapacity is likely to be permanent.

Chapter 32, §6(1) (Michie 1973), entitled "Ordinary Disability Retirement-Conditions for Allowance," provides:

> Any member in service who becomes totally and permanently incapacitated for further duty before attaining age fifty-five and after completing fifteen or more years of creditable service, or any such member who is a veteran as defined in section one who becomes totally and permanently incapacitated for further duty before attaining the maximum age for his group and after completing ten or more years of creditable service, upon his written application on a prescribed form filed with the board or upon such an application by the head of his department after a hearing, if requested, as provided for in subdivision (1) of section sixteen and subject to the conditions set forth in said section and in this section, shall be retired for ordinary disability as of a date which shall be specified in such application and which shall be not less than fifteen days nor more than four months after the filing of such application but in no event later than the maximum age for his group nor earlier than the last day for which he received regular compensation. No such retirement shall be allowed unless the board, after such proof as it may require, including in any event an examination by the medical panel provided for in subdivision (3) of this section and including a certification of such incapacity by a majority of the physicians on such medical panel, shall find that such member is mentally or physically incapacitated for further duty, that such incapacity is likely to be permanent, and that he should be so retired.

Finally, Chapter 22, §9(A) (Michie 1973), entitled "Division of State Police, Additional Appointments, etc.," provides in part:

No officer appointed under this section shall be denied re-enlistment if he has served satisfactorily for six years or more; provided that he has passed such physical examination as is prescribed by rules and regulations hereunder.

QUESTION PRESENTED

Whether a state employment scheme providing continuing individualized tests of performance and capability, which tests are shown by the evidence to be reliable and which are in fact relied upon by defendant Commonwealth for every other employment decision, may, consistent with the Fourteenth Amendment, involuntarily retire a capable state policeman merely because he has become fifty years of age?

STATEMENT OF THE CASE

Massachusetts' statute imposing retirement at the age of fifty—a unique statute among the several states, in fixing upon the age fifty—was held unconstitutional by the district court on a record which describes in extensive detail both the continuous screening, testing, review and evaluation operations of Massachusetts which are focused upon the performance capabilities of its state policemen and the particular capability of the plaintiff, Lt. Col. Murgia. The full factual background of the case is set out in the opinion of the court below[2] and in Brief for Appellees. In brief, the facts are as follows.

Plaintiff was involuntarily retired from the Massachusetts State Police because he became age fifty on July 23, 1972. At the time of his forced retirement, plaintiff "was in excellent physical health and capable of performing the duties of a state police officer, whether involving physical or psychological stress." (Op. 754) He was possessed of the "high versatility" required and was in no way even "partially superannuated" (Op. 754). These were the findings of the District Court and, indeed, the court below observed that testimony on these facts was "undisputed" (Op. 754).

The process of continued testing and scrutiny of a state policeman's performance and capabilities, upon which the findings as to plaintiff were based, is focused upon each policeman from the time of his recruitment until the end of his career. Entrance requirements are rigorous. A state policeman first serves two three-year probationary periods. Only after six years' service is he entitled to re-enlistment, and then only if "he has served satisfactorily" and if he "has passed such physical examination as is prescribed by the rules. . . ." Massachusetts General Law, Chapter 22, §9(A) (Michie 1973). The same

2. The opinion of the three-judge District Court for the District of Massachusetts is reported at 376 F.Supp. 753 (hereinafter cited as "Op.").

physical examination given to the young recruit on enlistment and re-enlistment is given to state policemen as they age, with the same high standard of fitness, agility, strength, health and self-possession being required of the older policemen. (Appendix 35, 49) Until a state policeman is forty, he must pass the examination every two years; after he is forty, he must successfully submit his capabilities to the examination annually. (Op. 754) These are the systematic mechanisms relied upon by Massachusetts to assure the performance capability of each of its state policemen. If any policeman fails to meet those requirements he is denied re-enlistment or given a disability retirement. Massachusetts General Law, Ch. 32, §26(2), Ch. 32, §6(1) and Ch. 22, §9(A) (Michie 1973).

The criteria for continued employment are tough and thorough, and periodically and individually applied. As the District Court found, in Massachusetts' system "[i]ndividual testing . . . is . . . the order of the day." (Op. 755) Massachusetts uniquely departs from the systematic individual determination of a state policeman's physical and mental capacity, when the policeman becomes fifty years old.

The record reveals no medical or psychological basis for such departure. Indeed, the record indicates that there is more variation in the ability of members of the same age group to perform satisfactorily as state policemen than there is between state policemen of differing ages. Massachusetts' intense individual screening processes to secure as state policemen workers capable of the job are themselves proof of the fact. In no other state has a statute fixed compulsory retirement at age fifty. Massachusetts' own data on disability discharges and the incidence of disability waivers (Op. 756) show a declining curve, not an ascending one, as state policemen approach age fifty, suggesting the efficacy and the reliability of Massachusetts' individual screening systems so arbitrarily cut off at age fifty.

Massachusetts set the age for compulsory retirement of state policemen at fifty in 1939, when longevity and work

life were shorter, the period of family responsibilities peaked earlier, and the host of other measures of vitality were not so well developed. In 1920, for example, ten years after Massachusetts' mandatory retirement scheme was established, the expected life span was 54 years; in 1940, one year after fifty was set by Massachusetts as the mandatory retirement age for state policemen, expected life span was 63 years; in 1972, expected life span was 71.[3] Despite these intervening changes and the absence of any evidence supporting maintenance of the standard of another generation, Massachusetts' mandatory retirement of its state policemen upon age fifty remains unaltered.

3. Figures are derived from Table 80 of the *Statistical Abstract of the United States* (1974).

ARGUMENT

Age Is Not Reasonably Linked with Mental or Physical Capability to Perform a Job, Let Alone Irrebuttably Linked.

Only in modern times have societies been so dominated by the stereotyped association of aging with incompetence to perform valued work.[4] The Congress has sought in the Age Discrimination in Employment Act of 1967 to end "the setting of arbitrary age limits regardless of potential for job performance" and to require the performance capability of aging citizens to be determined individually. Title 29, U.S.C. §621(a)(2).[5]

In this case[6] the question under the Equal Protection Clause is whether all state policemen, not yet aged fifty, may be provided individual determination of their capability to perform the job while all aging fifty are conclusively presumed incapable and summarily dismissed from the job. Massachusetts is blatant about the conclusive and irrebuttable relationship it assumes between aging fifty and incompetence to perform the job of state policeman. The Massachusetts statutory provision assumes the equation:

4. L. Cain, *The Growing Importance of Legal Age In Determining the Status of the Elderly*, 4 (1972); Donahue, Orbach & Pollack, *Retirement: The Emerging Social Pattern*, in Handbook of Social Gerontology 330, 334-36 (C. Tibbetts ed. 1960); M. Barron, *The Aging American* 25-26 (1961).

5. The Legislative History is express that individual determinations are required. *E.g.*, H. Rep. No. 805, 90th Cong., 1st Sess., 1967 U.S. Code Cong. & Adm. News 2220 recites "The case-by-case basis should serve as the underlying rule in the administration of the legislation." On the Act itself and on Congressional recognition of the stereotypic myths surrounding aging and employment, see Comment, *Age Discrimination in Employment: Correcting a Constitutionally Infirm Legislative Judgment*, 47 So. Cal. L.Rev. 1311 (1974).

6. This case arose before Congress acted in 1974 to extend the coverage of the Age Discrimination in Employment Act to include state and local government employees. 29 U.S.C.A. §630 (1975), as amended by P.L. 93-259, April 8, 1974, 88 Stat. 74.

"Retirement upon Attaining the Age Fifty-five or Expiration of Twenty Years of Service *for Physical or Mental Infirmity*." Massachusetts General Law, Ch. 32, §26(3) (Michie 1973) (Emphasis supplied). Measured against the individualized means otherwise chosen by Massachusetts to protect its interest in competent state police and scrutinized even for minimum rationality, a conclusive presumption tied to age fifty is supererogatory and invidious.

A. There Is No Reasonable Relationship Between Aging Fifty Years and Performance Capability as a State Policeman.

In *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920) and, most recently, in *Stanton v. Stanton*, 95 S.Ct. 1373, 1377 (1975), the Court has written:

> A classification must be reasonable, not arbitrary, must rest upon some ground or difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.

Age has no meaningful general relation to competence and, as the record in the lower court and the court's findings indicate, age fifty even more clearly has no relation to performance as a state policeman.

It is true, as the lower court and plaintiffs' experts themselves suggested, that "there is a general relationship between advancing age and decreasing physical ability." (Op. 755) But just as "the ability of any particular pregnant woman to continue at work past any fixed time in her pregnancy is very much an individual matter", *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 645-46, so is the ability of any person at any given age to do a particular job. Research in industrial gerontology establishes that there is more variation in the ability of workers in the same

age group than there is between ages.[7] The lower court found the evidence here clear and undisputed: "the relation between chronological age and functional age varies greatly from one individual to the next." (Op. 755) The point is not, as the Brief for Appellants argues at p. 48, that "determination of an age [for mandatory retirement] involves difficult judgments about the relationship between aging and physical and psychological capacity;" such judgments are indeed difficult and, amici would suggest, even impossible. The point is that such judgments are immaterial, so far as protecting Massachusetts' interest in a competent police force is concerned. To the individually-applied medical and psychological criteria which are invoked otherwise to secure the competent performance of the Massachusetts state police, the specification of age fifty as such adds no useful information. Massachusetts' sudden presumption at age fifty is "neither necessarily nor universally true", *LaFleur*, at 644, and is undisputedly false in the case of plaintiff. (Op. 754) Considering the context in which the presumption appears—Massachusetts' system of individualized judgments of competence—it is useless to the state's purpose,[8] and even dysfunctional.

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7. See, *e.g.*, I.M. Riley and A. Foner, *Aging and Society* 426-29, 1968); U.S. Bureau of Labor Standards, Dept. of Labor Bull. No. 1223 at 1 (1968); Mark, *The Older Worker: Measurement of Job Performance and Age*, 79 Monthly Lab. Rev. 1410, 1412-13 (1956).

8. The briefs of appellee and the other amici address the other purposes profferred by Massachusetts to sustain the age classification here in question. Each of those rationales—morale of the younger men, and the attractiveness of quick promotion—resolve finally, as the lower court found, to "age discrimination per se" (Op. 755).

Appellants' invocation of an assertedly intricately woven scheme of retirement and pension to justify classification by age 50 (Brief of Appellants at pp. 27-29) defies analysis. No purposes for the classification are specified there by appellants, apart from those noted by the District Court in its first opinion, 345 F. Supp. 1140, 1142 and found wanting in its second (Op. 754, 755). Appel-

Equal protection of the laws requires that each person be given the benefit of individual determinations of job competence, particularly where, as here, the state's task cannot be furthered by any age categorizing (indeed, it *requires* individualizing determinations); and where, as here, the state has actually adopted individualizing systems for competence determinations for all other state policemen.

B. The Particular Job Capabilities Required of a State Policeman Have No Reasonable Relationship to Aging Fifty Years.

Assessing the rationality of any asserted relation between aging and job performance capability demands attention to the capabilities required by the particular job in question, as well as to the adequacy of the age criterion as an index of competence in general and of any competence in particular. The tasks of a Massachusetts state

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Note 8—*Continued*

lants do not quite say, and in any event they could find no support in the record for such a proposition, that voiding the age fifty classification, or indeed any mandatory retirement age, would threaten the Massachusetts pension scheme with bankruptcy or even with serious readjustment. Of course there would have to be adjustments. But neither appellee nor any of the amici have suggested (compare Brief of Appellants at p. 28, n.15) that voiding mandatory retirement would result in retirement at a *lower* age, nor is it conceivable how that could be so. Nor have appellee or amici suggested that it is incumbent upon Massachusetts to increase the salaries of its older workers should mandatory retirement rules be lifted. [Appellants' projections on these two counts are, of course, contradictory, for the first (at n.15) would presumably lower aggregate pension and salary costs to the state and the second could raise them.]

Appellant offers nothing particular, beyond the miasma it apparently seeks to create, to suggest that the required adjustments would involve any greater administrative inconvenience than that found insufficient to sustain invidious classifications in *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Rinaldi v. Yeager*, 384 U.S. 305 (1966).

policeman include "restoring and maintaining order in prison and civil disorders, responding to emergencies and natural disasters, patrolling highways in marked cruisers, investigating crimes and apprehending criminals." (Appendix 54-55.) Both the lower court (Op. 754) and appellants themselves (in the Brief for the Appellants at p. 6, for example), are clear, as is the record, that these tasks require *both* physical *and psychological capabilities*. Yet in large portions of its brief, appellants emphasize only the physical capabilities required (Brief for the Appellants at pp. 9-11, the policeman's "physically stressful functions," for example) and often assert that the state's purpose in classifying at age fifty is "maintaining a physically sound police force" (Brief for the Appellants at p. 38), evoking the common stereotype linking aging and physical disability and suggesting its applicability to state policemen.

Appellants in their opening statement of facts characterize the Massachusetts State Police as a "paramilitary" operation (Brief for the Appellants at p. 6). The extensive literature on police functions establishes that such a characterization is inaccurate, reflecting an understanding of police functions themselves which is stereotyped. As one student of the police writes: "A police officer is not a soldier. But [many] people refuse to see him any other way."[9] The differences between the soldier and the policeman are wide and significant and are identified in the literature on the police function. For example, basic training seeks to instill in the private an instinctive obedience to orders, as required by military functions. A police academy seeks to teach its recruits to use their own judgment, for much of the policeman's work is alone or with a partner, and requires from each policeman an immediate evaluation of and response to particular developing situations. (Appendix 57) "The police must make important judgments about what conduct is in fact criminal; about the allocation of scarce resources; and about the

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9. J. Rubenstein, *City Police* 12-13 (1973).

gravity of each individual incident and the proper steps that should be taken", the Task Force on the Police, of the President's Crime Commission reported. "No task committed to individual judgment", the Task Force concluded, "is more complex or delicate [than a policeman's]."[10]

The capabilities required for a competent state policeman thus include the psychological as well as the physical, judgment and wisdom as well as physical endurance and agility. Those qualities of judgment may have a general relationship to aging, with experience and practice being the intervening mechanism, much like the "general" relationship between aging and physical ability. But judgment capabilities generally would *increase* with age, as physical ability generally declines, and reaching age fifty would not be a conclusive sign of disability, but a sign of capability. But, as amici here argue, reasonable judgment, and the realization of the state's purpose to maintain a competent police force, requires individual determinations of competence, undistorted by stereotype. Plaintiff in this case is admittedly capable both physically and psychologically. Where as here individual determinations of competence are provided already to all state policemen except those who have reached age fifty, equal protection requires them for all without regard to age.

C. Whether or Not Massachusetts' Fifty Year Mandatory Retirement Rule Was Constitutional When It Was Adopted in 1939, It Is Unconstitutional in 1975.

Even if a legislature might reasonably have believed in 1939 that there was a sufficient rational relation between aging fifty and capability to perform the tasks of a state

10. President's Comm'n. on Law Enforcement and Administration of Justice, *Task Force Report: The Police* (1967). See also James Q. Wilson, *Varieties of Police Behavior* 80-81 (1970); G. E. Berkley, *The Democratic Policeman* 53, 74 (1969); R. B. Fosdick, *European Police Systems* 229-30 (1915).

policeman to support the Massachusetts mandatory retirement rule, the facts, as well as the ability to know the facts, have so changed in thirty-six years that the rule and the presumption it embodies are now plainly arbitrary.

As then Mr. Justice Stone wrote in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 (1938), "the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing . . . those facts have ceased to exist." Similarly, in *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 1215, the Court declared that a conclusive presumption cannot constitutionally "disdain(s) present realities" relying on characteristics of the past, lest it "needlessly run(s) roughshod over important interests."

The development of the medical sciences and technology, and the increasingly wide distribution of their use and benefits in our society, and the development of the behavioral sciences have very significantly changed both the reality and our justified expectations as each affects the rationality of a supposed relation between aging and job capability. People are living significantly longer, healthier and more active lives. They have a different set of expectations of themselves and each other. While still not fully realized, the Congress has committed the Nation to a policy of full employment. Title 15, U.S.C. §§1021 *et seq*. Employment has expanded at a greater rate than the population.

Quite as important in the current matter, what we know and what is knowable, has changed as well. The study of aging has become a new science—gerontology. With it, and the developments in medical and behavioral technology, the ability to specify the parameters of competence and to identify their correlatives has increased. Massachusetts' refind processes for the individual determination of job competence demonstrate the advance in knowledge, and its applicability here, as do the contemporary facts recited elsewhere in this Brief, and in the Briefs of the parties and other amici. Given these changes,

the continued use thirty-six years later[11] of the conclusive Massachusetts presumption of disability of state policemen at age fifty is unique unto arbitrariness.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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11. The single recognition of the changing conditions in which the fifty year rule continues to exist occurred in 1955. A Special Legislative Commission reported to the Legislature in that year

> although some arguments for raising mandatory retirement above age 50 for uniformed members of Group C the state police appear to have merit, it was felt that a continuation of age 50 for the present might be justifiable. It is recommended that the retirement age be reviewed in the future. Mass.H. Doc. No. 2500 at 24 (1955).

Even with the report that the age fifty rule at best "*might* be justifiable" and in any event only "for the present", the Legislature did not act nor has it acted in the twenty years since.

MOTION FILED

SEP 2 1975

No. 74-1044

In The Supreme Court of The United States

OCTOBER TERM, 1974

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER of PUBLIC SAFETY of the COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF MOTION OF APPELLEE TO AFFIRM

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In The Supreme Court of The United States
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Appellants,

v.

ROBERT D. MURGIA,

Appellee.

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

The American Medical Association respectfully moves for leave to file a brief amicus curiae in support of the Motion of Appellee to Affirm this case. Appellee's attorneys have consented to the filing of this brief.

Respectfully submitted,

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Interest of the Amicus Curiae

The American Medical Association is the national professional association of physicians. Founded in 1846, the Association has a current membership of 208,000 physicians and serves as the representative of the medical profession in the United States and its Territories.

The goals of the American Medical Association, as written into the Association's Constitution more than a century ago, are "to promote the science and art of medicine and the betterment of public health." "The betterment of public health" in more recent years has been interpreted by the members of the medical profession to encompass the assurance of quality in life from the time of inception until cessation.

A sizeable portion of the Association's resources and efforts have been devoted through the years to the development of programs and services that would meet the medical and social needs of all segments of the American population. As advances in medical science have brought about improvements in the provision of medical care, higher levels of health education, better sanitation and general living conditions and the conquest of the severe diseases of childhood, dramatic increases in the number of older persons in the population have occurred. In 1955, a Committee on Aging was established by the Association to study the special problems of the aging and to propose methods for approaching these problems. One of the particular concerns of this Committee has been the effect upon society and the affected individual of arbitrary, compulsory retirement policies based solely upon attainment of a specific chronological age.

The following Position Statement is presented to the Court in support of plaintiff's suit challenging the constitutionality of MASS. GEN. LAWS ch. 32, § 26(3) (1966), providing for a mandatory retirement system which operates despite the ability of a member of the Uniformed Branch of the Massachusetts State Police to continue to perform his official functions for the Commonwealth of Massachusetts in a satisfactory manner.

Position Statement

It is the position of the American Medical Association that the nation's social policy for the aging should ensure that middle aged and older workers have the opportunity to continue in productive employment as long as they wish and are able physically, mentally, and medically to maintain the appropriate level of job efficiency. Such opportunities will enable many more middle aged and older people to look forward to more years of independence, dignity, and usefulness. The American Medical Association believes that the middle aged and older workers who are physically, mentally, and medically able to continue working should have a choice about when, or even *if* they wish to retire.

Unrealistic employment or retirement policies create problems for the individual, the family, and the community. For the individual, such policies set him apart from the rest of society and classify him as a non-productive member. They deny him the satisfaction of full participation in community life and may prevent him from being financially independent. Arbitrary retirement policies coupled with the denial of work opportunity seriously threaten the health of the individual concerned. Medicine sees in mandatory retirement a direct threat to the health and life expectancy of the persons affected.

For society, the failure to use the wisdom, experience, and productivity of middle aged and older persons creates voids that may be filled by those less capable. Instead of using proficient middle aged and older people, society sets up special agencies to care for them in their dependency, then spends more funds to train new younger workers. These losses could be reduced if middle aged and older persons had more opportunities to remain productive.

Middle aged and older people usually have longer periods of unemployment, have more difficulty in finding new jobs, and are frequently subject to forced retirement at an arbitrarily determined age.

In the opinion of the American Medical Association, any decision for or against retirement should rest on the same fundamentals as does a decision for or against hiring: (1) the individual's desire to work; and (2) the individual's ability to work.

Chronological age has been observed to have no magic in terms of judgment, ability, and physical dexterity. Individuals may lose these qualities at age 40 or retain them past age 80. The granting and continuance of employment opportunities should be based on the individual's competence and ability — not his age.

Compulsory retirement on the basis of age impairs the health of many individuals who might otherwise benefit from medical advances and improved social conditions. The physical and mental health of an individual can be affected by loss of status, lack of meaningful activity, fear of becoming dependent, and by isolation. Compulsory retirement produces a chain reaction in the health of such persons.

Man's increasing life expectancy will prove of little use to him if at an arbitrary age he is denied the right to work and produce. Further, if he is forced into idleness, it is questionable whether our society can survive the financial burden of larger numbers of dependent persons. Our society and economy need the productive contributions that middle aged and older men and women can make.

Arbitrary segregation of individuals because of arbitrarily determined chronological age is not healthy for the nation or the individual. The sudden cessation of productive work and earning power of an individual, caused by compulsory retirement, often leads to physical and emotional illness and premature death.

In joining in this litigation, the American Medical Association can better implement the 1971 policy statement adopted by its House of Delegates declaring:

> Since compulsory retirement and artificial barriers to employment based on age can be prime factors in the deterioration of health, middle aged and older workers should be afforded equal opportunities with others for gainful employment, based on their personal desires and capabilities.

The American Medical Association believes that Mass. Gen. Laws ch. 32, § 26(3) (1966) should be declared invalid and in violation of the Fourteenth Amendment to the United States Constitution in that it arbitrarily discriminates against persons who have reached a specific chronological age. This class discrimination has no rational relationship to a legitimate governmental purpose and deprives the members of the class of valuable property rights without due process of law in the same manner as other laws held invalid by the Supreme Court on the basis of discrimination against persons of a given race, sex, or national origin.

Conclusion

For the reasons stated herein and in the "Argument" in support of Appellee's Motion to Affirm, the American Medical Association respectfully urges this Court to declare said § 26(3) of Mass. Gen. Laws ch. 32, unconstitutional and issue a mandatory injunction requiring the Commonwealth to reinstate Appellee and all others similarly discriminated against as a member of the Uniformed Branch of the Massachusetts State Police and to continue such employment until such time as the employee voluntarily retires, is incapable of performing assigned duties, or otherwise furnishes the Commonwealth of Massachusetts with valid cause for discharge.

Respectfully submitted,

/s/ Bernard D. Hirsh
Attorney for the American Medical Association Amicus Curiae

September 2, 1975

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Motion for Leave to File Brief Amicus Curiae in Support of Appellee's Motion to Affirm and Brief Amicus Curiae in Support of Appellee's Motion to Affirm have been served upon defendants by causing copies thereof to be hand delivered to their counsel, Francis X. Bellotti, Attorney General, 373 State House, Boston, Massachusetts 02133, on this 2nd day of September, 1975.

/s/ Bernard D. Hirsh

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1044

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Appellants,

—v.—

ROBERT D. MURGIA,

Appellee.

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BRIEF FOR LEGAL SERVICES FOR THE ELDERLY POOR, AMERICAN CIVIL LIBERTIES UNION, THE NATIONAL COUNCIL OF SENIOR CITIZENS AND THE MASSACHUSETTS CIVIL LIBERTIES UNION, AS *AMICI CURIAE*

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Statement of Interest

Legal Services for the Elderly Poor is funded by Community Action for Legal Services and the U.S. Department of Health, Education and Welfare to provide assist-

ance on research and litigation to lawyers dealing with the problems of the elderly. Legal Services for the Elderly Poor is particularly concerned with discrimination in employment against older persons, which is almost universal in the United States, and which denies approximately 10 per cent of this country's population the opportunity to earn a living and to contribute to society by continuing to work.

Legal Services for the Elderly Poor has participated as co-counsel or *amicus* in numerous cases before this Court involving the elderly including *Graham* v. *Richardson,* 403 U.S. 365 (1971), *Allied Chemical Workers* v. *Pittsburgh Plate Glass,* 404 U.S. 107 (1971), and *Ortwein* v. *Schwab,* 410 U.S. 656, *reh. den.,* 411 U.S. 922 (1973).

The American Civil Liberties Union is a private non-partisan organization of 250,000 members, engaged exclusively in the defense of the Bill of Rights. During its 55 years of existence, the Union has regularly advanced arguments to this Court under the Equal Protection Clause of the Fourteenth Amendment on behalf of a variety of groups and individuals who have suffered discriminatory treatment at the hands of state or local governments. In this brief, we argue on behalf of the elderly that mandatory retirement is a violation of equal protection, pursuant to the policy of the American Civil Liberties Union that "The test for employment should be the ability of the individual to perform the particular job function."

The National Council of Senior Citizens is the largest organization composed of senior citizens clubs in the United States. Incorporated as a non-profit organization in the

District of Columbia, it consists of more than 3,000 clubs with a membership of more than three million older persons. A majority of the members are retired and membership in the near future will come mainly from the ranks of older workers, many of whom will be affected by mandatory retirement provisions applicable to Federal, state or local government employment. Other members and prospective members face mandatory retirement in their nongovernmental jobs. Although they will not be affected directly by the outcome of this litigation, this Court's decision may well influence the future course of requirements for retirement at a fixed chronological age in all types of employment.

All parties have consented to the filing of this *amicus* brief.

The consent letter is annexed.

Summary of Argument

Mandatory retirement excludes by illegal classification of people past a certain chronological age. This irrational exclusion violates equal protection by preventing the normal, appropriate, individual determination on the merits of job capabilities and performance. In particular this brief demonstrates in detail that all the scientific evidence militates against this unconstitutionally irrational exclusion and blanket presumption.

I.

Introduction.

> To be seventy years young is sometimes more cheerful and hopeful than to be forty years old.
>
> —*Oliver Wendell Holmes*

The following sections deal with two prime constitutional infirmities of mandatory retirement: equal protection and due process. But these two infirmities are actually more powerful in combination. Both are part of the Bill of Rights and establish the rights of the individual in our democratic society. Together they assert a fundamental democratic principle: each individual has a right to be judged and treated on the basis of his individual merit. Equal protection prevents any classification which would limit this individual right. Due process guarantees that procedures exist to make sure the characteristics that justify different treatment really pertain to the individual. In this case, the classification (by mandatory retirement) to exclude from the protection by due process violates this fundamental principle. In this connection, it should also be noted that this classification to exclude with neither reason nor procedure also invades the First Amendment rights of association and freedom: not only the freedom to work, but also freedom of association with fellow workers and individuals similarly situated, and also the freedom to communicate ideas made possible by the status and income that comes from the pursuit of one's chosen occupation (for which one is still qualified).

Application of constitutional doctrine in this case leads to the conclusion that mandatory retirement at age 50—or at any age—is a classification that violates the equal protection clause of the Fourteenth Amendment. That conclusion is inevitable under both the strict scrutiny test and the rational relationship test of the equal protection clause.

In order to justify application of the more demanding strict scrutiny test, the Court must conclude, of course, that age is a suspect classification or that employment is a fundamental right. We believe that both conditions are met in this case. We also assert in Point IV, *infra,* that age-based retirement violates the due process clause of the Fourteenth Amendment because, among other things, it embodies a constitutionally offensive irrebutable presumption and no specific rational determination.

II.

Age-based mandatory retirement violates the equal protection clause.

A. *Employment Is a Fundamental Right*

Many of this Court's decisions have emphasized the fundamental importance of employment. Mr. Justice Bradley, concurring in *Butchers Union Slaughterhouse & Live-Stock Trading Co.* v. *Crescent City Live-Stock Landing & Slaughterhouse Co.,* 111 U.S. 746, 762 (1884), wrote:

> . . . The right to follow any of the common occupations of life is an inalienable right; it was formulated as such under the phrase 'pursuit of happiness' in the

> Declaration of Independence, which commenced with the fundamental proposition that 'all men are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life; liberty and the *pursuit of happiness*.' This right is a large ingredient in the civil liberty of the citizen.

In *Truax* v. *Raich,* 239 U.S. 33, 41 (1915), the Court spoke of "the right to work for a living in the common occupations of the community" as being "of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure." Accord, *Roe* v. *Wade,* 410 U.S. 113, 169 (1973) (Stewart, J. concurring). And in *Board of Regents* v. *Roth,* 408 U.S. 564, 572 (1972), this Court, citing *Meyer* v. *Nebraska,* 262 U.S. 390, 399 (1928), described the Fourteenth Amendment's guarantee of liberty as including "the right of the individual to . . . engage in any of the common occupations of life . . .".

Last year, this Court reaffirmed that public employment rights are entitled to a high degree of constitutional protection. In *Arnett* v. *Kennedy,* 416 U.S. 134 (1974), six members of the Court stated that a non-probationary federal employee could not be discharged without the constitutional protections of procedural due process. And in *Perry* v. *Sindermann,* 408 U.S. 593 (1973), this Court held that if a state college teacher could prove that the college had a *de facto* tenure policy under which he would be considered to be tenured, the college could not discharge him without affording him the procedural protection of constitutional due process.

In this Court's working out the constitutional standards —at one time substantive, today procedural in most instances—applicable to public employees, a fundamental premise has persisted throughout its work. Seldom articulated because so basic, that premise has been—and is—that employment is a crucial facet of existence in America. For example, in *Smith* v. *Texas,* 233 U.S. 630 (1914), a railroad engineer was found guilty of violating a state law prohibiting any person from acting as a freight train conductor without having previously served for two years as a conductor or brakeman. There was no dispute that Smith was indeed competent to perform such duties.

Dwelling upon "the necessity of the fixing of arbitrary tests by which competent persons would be excluded from lawful employment," 233 U.S. at 637, the Court rejected "the proposition that conditions may be imposed by statute which will admit some who are competent and arbitrarily exclude others who are equally competent to labor . . .". *Id.* at 638. The Court reasoned (*Id.*):

> None of the cases sustains the proposition that under the power to secure the public safety, a privileged class can be created and be then given a monopoly of the right to work in a special or favored position. Such a statute would shut the door, without a hearing, upon many persons and classes of persons who were competent to serve and would deprive them of the liberty to work in a calling they were qualified to fill with safety to the public and benefit to themselves.

The law at issue permitted, with minor exceptions, only freight train brakemen to rise to the position of conductor, while excluding everyone else. The statute did "not require

the brakeman to prove his fitness, though it . . . [did] prevent all others from showing that they . . . [were] competent." *Id.* Thus, the statute "absolutely excludes the whole body of the public, including many railroad men, from the right to secure employment as conductor . . .". *Id.* at 639. And so the Court reversed, concluding: "[A]ll men are entitled to the equal protection of law in their right to work for the support of themselves and their families." *Id.* at 641. In reaching that conclusion, the Court was clear about the fundamental nature of access to employment (*Id.* at 636):

> Insofar as a man is deprived of the right to labor, his liberty is restricted, his capacity to earn wages and acquire property is lessened, and he is denied the protection which the law affords to those who are permitted to work. Liberty means more than freedom from servitude, and the constitutional guarantee is an assurance that the citizen shall be protected in the right to use his powers of mind and body in any lawful calling.

Forty years later, this Court said in *Wieman* v. *Updegraff*, 344 U.S. 183, 192 (1952):

> We need not pause to consider whether an abstract right to public employment exists. It is sufficient to say that constitutional protection does extend to the public servant whose exclusion pursuant to a statute is patently arbitrary or discriminatory.

See also, *Schware* v. *Board of Bar Examiners,* 353 U.S. 232, 238-239 (1957); *Keyishian* v. *Board of Regents,* 385 U.S. 589, 605-606 (1967): "[T]he theory that public em-

ployment . . . may be subjected to any conditions, regardless of how unreasonable, has been uniformly rejected."; *Pickering* v. *Board of Education,* 391 U.S. 563 (1968); *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974).

Mandatory retirement policies established by government are, of course, obvious bars to employment. Very simply, they establish a group of persons who are rendered ineligible for retention, and for hiring. As such, they violate the Equal Protection Clause of the Fourteenth Amendment.

B. *"Old Age" Is a Suspect Classification*

This Court has never ruled on the question whether classifications based upon age are inherently suspect. But, through the years the Court has recognized certain classifications as suspect: race—*Loving* v. *Virginia,* 388 U.S. 1 (1967); national ancestry—*Takashashi* v. *Fish and Game Commission,* 334 U.S. 410 (1948); alienage—*Graham* v. *Richardson,* 403 U.S. 365 (1971). Classifications based upon sex are also fast becoming recognized as suspect. In *Frontiero* v. *Richardson,* 411 U.S. 677 (1973), four Justices held that sex was a suspect classification.

> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility. . . .' *Weber* v. *Aetna Casualty & Surety Co.,* 406 U.S. 164, 175, 31 L Ed 2d

> 768, 92 S Ct 1400 (1972). . . . As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members. 411 U.S. at 686-87.

Age, like sex, race and national origin, is also an immutable characteristic determined solely by the accident of birth. As the studies of work performance, and the historical accomplishments of those in their seventies (Appendix A), indicate the actual capabilities of those forced to retire are ignored by mandatory retirement statutes. It is as true for age as it has been for all classifications found suspect by this Court, that individual differences are far more significant than group characteristics, and that the imposition of disabilities on the basis of a group characteristic is abhorrent to individual responsibility.

Hernandez v. *Texas,* 347 U.S. 475, 478 (1954), holds that "when the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treatment not based on some reasonable classification, the guarantees of the Constitution have been violated." This guarantee of equal protection refers to the explicit language of the Fourteenth Amendment.

> The State may not say that all white men shall be subjected to the payment of the attorney's fees of parties successfully suing them and all black men not. *It may not say that all men beyond a certain age shall be alone thus subjected,* or all men possessed of a certain wealth. These are distinctions which do not

> furnish any proper basis for the attempted classification. That must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. *Gulf, C. and S.F.R. Co.* v. *Ellis,* 165 U.S. 150, 155 (1897). [Emphasis added.]

To the same effect, see *Mollere* v. *Southeastern Louisiana College,* 304 F. Supp. 826 (E.D. La. 1969), where discrimination against females under the age of twenty-one was found to be irrational and therefore unconstitutional.

In *San Antonio School District* v. *Rodriguez,* 411 U.S. 1, 28 (1973), this Court defined as a suspect class those who are "saddled with such disabilities, subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Are older people "subjected to . . . a history of purposeful unequal treatment . . . ."? Clearly yes. That history is perhaps not a long one: in the 19th century and before, few people attained 65 years of age, and those who did were productive members of society. See Section IV, *infra.* But the history of the 20th century is one of increasing prejudice and prejudicial treatment, exemplified by the expansion of mandatory retirement policies and statutes. Presumably, it might be suggested that one must wait for 300 years of discrimination, such as Blacks have experienced, before the "history of purposeful unequal treatment" rises to constitutional significance. To offer the thought, however, is to reject it.

Discrimination in employment on the basis of age pervades American industry. See Point IV(A), *infra*. In recognition of this fact, Congress passed the Old Age Discrimination Act of 1967, 29 U.S.C.A. §§621-634. Where the "Congressional statement of findings and purpose," 28 U.S.C.A. §621, goes far to identify the seriousness of the class disability, the substantive sections offer only partial remedies, and this only to those under 65, the less severely burdened portion of the older population. Discrimination continues to plague older Americans, and government on all levels continues to sustain it by mandatory retirement policies, excluding qualified people solely on the basis of age.

C. *No Compelling Interest Justifies Mandatory Retirement*

Given the fundamental right at stake, as well as the suspect nature of the classification, mandatory retirement can only be justified by a compelling governmental interest. *Dunn* v. *Blumstein,* 405 U.S. 330, 343 (1972).

The most common justification offered in support of mandatory retirement practices, and the justification offered in this case, is the claimed inability of older workers to satisfy the "physical and psychological demands of the job" (App. Br. 12). Obviously the state is justified in requiring that its employees be capable of performing their jobs, but the state must be able to show this Court that such an interest is served by its policy of mandatory retirement. In fact, scientific studies do not support appellant's policy. To the contrary, as we show in Point V, *infra,* the studies establish just the opposite—that older workers perform as well or better than their younger

counterparts. Therefore, while the state has the required interest in ensuring the productivity and capability of its employees, in this case the state has failed in its proof, for it has done barely more than assert that state police officers over the age of fifty cannot satisfactorily do their job.

D. *The Suggested Newer Standard of Equal Protection Analysis, Applied to Mandatory Retirement, Requires the Conclusion That the Practice Is Unconstitutional*

In *Reed* v. *Reed,* 404 U.S. 71 (1971), this Court, quoting from *F. S. Royster Guano Co.* v. *Virginia,* 253 U.S. 412, 415 (1908), enunciated what has come to be regarded by some courts and commentators as a more stringent standard of equal protection review than the so-called mere rationality test. The Court said that "classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, . . . '." (Citation omitted.) 404 U.S. at 76.

Brenden v. *Independent School District 742,* 477 F.2d 1202 (8th Cir. 1973) is illustrative of the thrust of the scrutiny invited by *Reed,* as well as instructive in examining the constitutionality of mandatory retirement. The *Brenden* court affirmed an injunction barring enforcement of a high school rule which precluded females from participating with males in high school interscholastic activities. In reaching that result, the court reasoned:

> [T]he underlying purpose of the High School league's rule is, as we have indicated, to insure that persons with similar qualifications will compete with each other. Yet, females, whatever their qualifications, have been barred from competition with males on the basis

> of an assumption about the qualifications of women as a class. The failure to provide the plaintiffs with an individualized determination of their own ability to qualify for positions on these teams is, under *Reed,* violative of the Equal Protection Clause. . . . 477 F.2d at 1302

Obviously, "individualized determination" is exactly what mandatory policies preclude.

Under *Reed,* there must be a fair and substantial relation between the classification made and the object of the legislation. Does that relation exist for compulsory retirement laws? Again, whether the object is job performance, removal of "deadwood," fluidity in the job structure, avoidance of decision making, or economic efficiency, the answer must be in the negative. If any lesson emerges from the study of mandatory retirement, it is that there simply is no correlation between age and ability. Given that glaring absence, arguments couched in terms of job performance—the only argument urged by appellants—simply collapse.

E. *Even Under the Mere Rationality Tests, Mandatory Retirement Must Fail*

It is of course mere intellectual exercise to talk of mandatory retirement's constitutionality in terms of its only needing some rational basis to sustain it. The right at issue, access to employment, and the classification made militate against this least stringent constitutional standard applying. Yet even were it deemed to apply, mandatory retirement would have to fail.

Even if one were to assume that age is a relevant factor for classification, and that age 50 in particular bears some

rational relationship to work capacity, the statute in question in this case would still be unconstitutional. It has been held in many courts that in spite of general presumptions of general physical probabilities, no matter how weighty, individuals nonetheless may not be excluded, particularly from employment, unless it has been shown that the general characteristic applies *to that individual* excluded for that general reason. See, for example, *Weeks* v. *So. Bell Tel. and Tel. Co.,* 408 F.2d 228 (5th Cir. 1969).

In this connection, *Bowe* v. *Colgate Palmolive Co.,* 416 F.2d 711, 718 (7th Cir. 1969) is instructive. In that case, the company refused to let women have jobs which required lifting weights of more than thirty-five pounds because of claims of biological inadequacy. The Court struck down this policy of the company, and held that "all workers . . . [must] be afforded a reasonable opportunity to demonstrate his or her ability to perform more strenuous jobs on a regular basis." See also, *Cheatwood* v. *So. Central Bell Tel. & Tel. Co.,* 303 F. Supp, 754 (M.D. Ala. 1969); *Rosenfeld* v. *Southern Pacific Co.,* 293 F. Supp. 1219 (C.D. Calif. 1968). We demonstrate in the following sections of the brief that scientific and scholarly studies prove that there is *no* basis whatever for the state to assume that all persons at a given age—or all state police officers at age 50—become incapable on the day of their "critical" birthday of performing their work as well as it was performed the previous day.

The proof which we set out in the next section so strongly supports the proposition that a particular arbitrarily chosen age is never universally—or even often—related to job performance, that the legislative classification in this case cannot even satisfy the lenient rational-relation-

ship test of the equal protection clause. See *Phillips* v. *Martin Marietta Corp.*, 400 U.S. 542 (1971); *Weeks* v. *So. Bell Tel. and Tel. Co., supra; Bowe* v. *Colgate Palmolive Co., supra.* Nor, needless to say, does the classification satisfy the middle-ground test enunciated in *Reed* v. *Reed, supra.*

III.

Age-based mandatory retirement violates the due process clause.

A. *Age-Based Mandatory Retirement Embodies a Constitutionally Offensive Irrebutable Presumption*

In *Cleveland Board of Education* v. *LaFleur,* 414 U.S. 632 (1974), the Court struck down school board policies requiring the termination of service of pregnant schoolteachers. In doing so, the Court relied on the independent ground that the policies constituted constitutionally offensive irrebutable presumptions:

> [T]he provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is no individualized determination by the teacher's doctor—or the school board's—as to any particular teacher's ability to continue at her job. The rules contain an irrebutable presumption of physical incompetency, and that presumption applies even when the medical evidence as to an individual woman's physical status might be wholly to the contrary. 414 U.S. at 644.

This language could almost be literally transposed to the case of a mandatory retiree. An irrebutable presumption is erected that at age 65—or 60, or as here, age 50—physical and/or mental ability declines—without any individualized assessment at all of the employee's actual abilities or competence.

The *LaFleur* Court, assuming *arguendo* that some pregnant women *are* physically unable to work, went on to reason that "it is evident that there are large numbers of teachers who are fully capable of continuing work for longer than" the regulations in question permitted. 414 U.S. at 646. Thus, the Court concluded:

> [T]he conclusive presumption embodied in these rules, . . . is 'neither necessarily [nor] (sic) universally true,' [citing *Vlandis* v. *Kline,* 412 U.S. 441 (1973)] and is violative of the Due Process Clause. *Id.*

Virtually every scientific study, as well as simple knowledge of people, confirms that people do differ—that the man who is chronologically 40 years old can be physically and mentally 60 years old, and that the 70 year old can in turn be physically and mentally 25. See Section V, *infra.* There simply is no inflexible truth, universal and necessary, that all 50 year olds are equal as compared to each other, or unequal as compared to their younger fellows.

LaFleur, while the strongest and clearest articulation by this Court of Constitutional abhorrence of irrebutable presumptions which deny individualized assessment of people, is no aberration. In *Vlandis* v. *Kline,* 412 U.S. 441 (1973), this Court declared unconstitutional (as violative of the due process clause) a Connecticut statute mandating the

irrebutable presumption of college students' non-residency. Because "permanent irrebutable presumptions have long been disfavored under the Due Process Clauses of the Fifth and Fourteenth Amendments," 412 U.S. at 446, this Court struck down the statute before it, rejecting such presumptions when they are "not necessarily or universally true in fact, and when the State has reasonable alternative means of making the crucial determination." *Id.* at 452.

Similar reasoning was employed in *Stanley* v. *Illinois*, 405 U.S. 645 (1972), where the Court addressed an Illinois law providing that, while a child could be taken away from its parents by the state only after notice, a hearing, and proof of parental unfitness, unwed fathers were conclusively presumed to be unfit and therefore were not accorded these due process protections. Rejecting this scheme, the Court said:

> Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. 405 U.S. at 656-57.

Obviously, these decisions—particularly *LaFleur*—are directly apposite in assessing the constitutionality of mandatory retirement laws.

B. *Age-Based Mandatory Retirement Violates the Due Process Clause, Even Short of Applying the Irrebutable Presumption Doctrine*

In *Schware* v. *Board of Bar Examiners*, 353 U.S. 232 (1957), the Court set a minimum requirement for exclusion of persons from government (or government-regulated) employment.

> A state cannot exclude a person from the practice of law or from any other occupation in a manner or for reasons that contravene the due process or equal protection clause of the fourteenth amendment. . . . A state can require high standards of qualification, . . . but any qualification must have a rational connection with the applicant's fitness or capacity to practice law. . . ." 353 U.S. at 238-39.

Unless a hearing is provided, that rational connection cannot be established, nor its assertion controverted. Typically—and indeed in the case of the appellee—no hearing is provided. The employee is automatically ousted upon attaining the critical age. Obviously, no procedural protections are provided—a defect of constitutional proportions. Cf. *Arnett* v. *Kennedy, supra,* holding that a tenured public employee could not be terminated without procedural due process. As Mr. Justice Powell there stated in an opinion in which Mr. Justice Blackman joined, the two concurring in part and concurring in the result in part:

> While the legislature may elect not to confer a property interest in federal employment, it may not constitutionally authorize the deprivation of such an interest, once conferred, without appropriate procedural safeguards. 416 U.S. at 167.

See, also, opinion of Mr. Justice White, *Id.* at 171-203, opinion of Mr. Justice Marshall (joined by Justices Douglas and Brennan), *Id.* at 206-31.

IV.

The facts of age and employment.

A. *The History of Mandatory Retirement*

The proportion of people over age 65 in America remained quite small until the twentieth century; in 1900 only 4% of the population was 65 or older.[1] These people continued to participate in the work life of the community. In 1890, 68.2% of men 65 and older were active members of the work force.[2] Three decades later, a majority of all men 65 and over remained in the work force.[3]

The twentieth century has witnessed fundamental changes in both the proportion and utilization of older people. Persons 65 and older now total more than twenty million; by the year 2000 they will probably number 29 million.[4] The advances in health and nutrition which have made this increase possible suggest that the capabilities of the older population have improved. One would expect a more active and productive older population now than fifty years ago, yet one finds a dramatic decrease in work participation. Only 25% of males 65 and older were active in

[1] U.S. Bureau of the Census, *Abstract of the 12th Census* 11 (1904).

[2] G. Mathiasen (ed.), *Criteria for Retirement* 13 (1953).

[3] *Id.*

[4] U.S. Dept. of Commerce, *U.S. Statistical Abstract 1974* 6 (1974).

the work force in 1970.[5] For all persons of this age, the figure is a meager 3.4%.[6] How does one account for this development?

During the twentieth century, the practice of mandatory retirement, began to grow in our society. A United States Department of Labor survey of 8.8 million male workers reported:

> Of the 8.8 million employed males in 1969, one-third faced compulsory retirement at 65 years of age, generally considered the usual retirement age in many private pension plans, the Social Security Act and the ADEA, less than 2 percent were subject to plans which provided for compulsory retirement under private employer pension plans before reaching the age of 65, and 12 percent will be required to retire at age 66 or older, ...[7]

In terms of numbers, the males surveyed who were subject to compulsory retirement totalled 4.2 million.[8] Another government study, of 224,000 women retirees, established that 34 percent of those aged 65 and over who left their jobs did so because of a mandatory retirement requirement.[9] A more recent survey reports that "61 percent

[5] B. Smith, *Aging in America* 19 (1973).

[6] U.S. Department of Labor, *Age Discrimination in Employment Act of 1967* 43, Table I (1974).

[7] *Id.* at 18-19.

[8] The report cautioned that "the figures on compulsory retirement may understate the proportion of workers subject to such provisions." *Id.* at 20, n. 1.

[9] Reno, "Women Newly Entitled to Retired-Worker Benefits: Survey of New Beneficiaries," V. 36, No. 4, Social Security Bulletin 3 (April 1973).

of all working people can expect that at a fixed age they will be told to retire from their jobs."[10] Yet mandatory retirement is not supported by popular opinion in this country.[11]

Nutured on myths and misconceptions,[12] compulsory retirement serves only to abuse the guarantees of due process and equal protection.

> Mandatory retirement policies as they are presently operated apply an arbitrary standard to all employees who reach a stated age limit. The inexorable passage of time is deemed prima facie evidence of incompetence —yet the weight of economic data collected by both public and private sources indicate that such facile distinctions are not justified. This arbitrary standard coupled with the adverse consequences of retirement and the inability of the elderly worker to find substitute employment make retirement based solely on age violative of the due process and equal protection clauses of the Constitution.

Note, "Too Old To Work: The Constitutionality of Mandatory Retirement Plans," 44 So. CAL. L. REV. 150, 179 (1971).[13]

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[10] Louis Harris and Associates, Inc., *The Myth and Reality of Aging in America* 211 (1975) (hereinafter *Harris Survey*).

[11] *86%* of the population believed "nobody should be forced to retire because of age, if he wants to continue working and is still able to do a good job." *Id.*

[12] See, e.g., Withers, "Some Irrational Beliefs about Retirement in the United States," *Industrial Gerontology* 23 (Winter, 1974).

[13] See, in general, *Age Discrimination and the Over-Sixty-Five Worker*, 3 Cumberland-Samford L. Rev. 333 (1966); *Age Discrimination in Employment: Correcting a Constitutionality In-*

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B. *Mandatory Retirement Causes Economic, Physical and Emotional Harm to Retirees*

Our culture places work at the center of social life. It is a crucial source of personal definition, and a primary determinant of social status. It provides the routine structure for daily activity. The work place provides a primary source of meaningful social contacts. The ability to earn money is basic to a sense of autonomy. All of these bases of personality (autonomy, self-worth, interpersonal relationships) face disintegration with the loss of work through mandatory retirement.[14] The Committee on Aging of the American Medical Association has reported on the psychological and somatic consequences of mandatory retirement, concluding that enforced idleness undermines health.[15] Un-

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firm Legislative Judgment, 47 So. Cal. L. Rev. 1311 (1974); *Age Discrimination in Employment: The Problem of the Older Worker*, 41 N.Y.U. L. Rev. 383 (1966); *Mandatory Retirement: A Vehicle for Age Discrimination*, 51 Chi.-Kent L. Rev. 116 (1974).

[14] Mathiasen, *supra* at 66.

[15] . . . [At] a certain chronological age—most often 65— . . . outside forces outside of medicine inflict a disease—or disability-producing condition upon working men and women that is no less devastating than cancer, tuberculosis, or heart disease. This condition—enforced idleness—robs those affected of the will to live full well-rounded lives, deprives them of opportunities for compelling physical and mental activity, and encourages atrophy and decay. It robs the worker of his initiative and independence. . . .

There is ample clinical evidence that physical and emotional problems can be precipitated or exacerbated by denial of employment opportunities. Few physicians deny that a direct relationship exists between enforced idleness and poor health. . . .

The physical and mental health of an individual can be affected by loss of status, lack of meaningful activity, fear of becoming dependent, and by isolation. Compulsory retirement produces a chain reaction in the health of such persons. It is a fact that the working man finds it difficult to accept the feeling of no longer

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less a "productive, routinized and ego-satisfying substitute for employment" can be found, the person victimized by mandatory retirement faces a situation "as devastating to his self-image and social adjustment as would be [that of] a mandatory rule that he change sexes at a given age." [16]

These problems are compounded by the effects of poverty: "their low economic position also appears to increase dramatically their sense of loneliness and rejection by society . . . and heighten their feeling of isolation." [17] One-sixth of the elderly in this country live below the poverty line; many more live just above it.[18] Mandatory retire-

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being needed on the job. He loses contact with his work associates—many of whom may have been his closest friends—and is thrown back on the family. Here, having a lesser part to play, he may experience loss of dignity and status. This is particularly so if his contributions to the family social circle previously have revolved solely or primarily around a recounting of his job experiences. The individual who has developed virtually no interests outside of those connected with his paycheck, who does not keep up with community affairs or dress up as he did when working, who can offer little to the family circle except his presence underfoot for 24 hours a day, may soon find himself isolated from the family itself. While isolation, per se, does not cause illness, it increases the chances of physical or emotional disturbance. It may also activate underlying neuroses, contribute to obesity and alcoholism and even precipitate an underlying tendency to suicide. . . . *Committee on Aging, American Medical Association, Retirement—A Medical Philosophy & Approach* 1-3.

[16] B. Kutner, D. Fanshel, A. Togo, and T. Langer, *Five Hundred Over Sixty* 253 (1956).

[17] Harris Survey, *supra* at 131. See, generally, for the isolation of the elderly and poor worker, G. Rosenberg, *The Worker Grows Old* (1970).

[18] Special Committee on Aging, United States Senate, "Developments in Aging: 1974 and January-April 1975, 94th Cong., 1st Sess., 1975," at XVIII. "More than four million women in this

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ment plays a real role in this situation. The median incomes for men who left jobs with compulsory retirement provisions was $7,880, while their post-retirement median benefit income was only $3,380.[19]

If the retiree looks for other employment, he will very likely find that he is ineligible because of his age. He has become a valueless commodity on the job market.[20] The interaction of economic and psychological consequences of forced retirement can be disastrous to an individual victim.

The views of those 65 and over who are retired or unemployed, give full expression to these deprivations occasioned by mandatory retirement. Thus, in a recent survey, 74% reported that they missed the money the job brings in.[21] Seventy-three percent missed the people at work, while 62% missed the work itself. The feeling of being useful was missed by 59%; 57% missed "things happening around" them. The lack of respect of others was felt by 50%, and 43% missed have a fixed schedule every day.[22]

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country are old and alone and over half that number are also living their last years in poverty." Heidbrener, "Pensions and the Single Woman," *Industrial Gerontology* 52 (Fall 1972).

[19] Reno, "Compulsory Retirement Among Newly Entitled Workers: Survey of New Beneficiaries," v. 35, no. 3 Social Security Bulletin 1 at 10-12 (March 1972). See also, "Too Old to Work . . . ", *supra* at 152-55.

[20] Special Committee on Aging, United States Senate, "Employment Aspects of the Economics of Aging," at 10-11, 91st Cong., 1st Sess., 1969.

[21] *Harris Survey, supra* at 218.

[22] *Id.*

V.

The justifications offered for mandatory retirement rely upon myth and misconception.

A. *Chronological Age Is Not a Cause of Declining Job Performance*

The typical justification for age-based mandatory retirement is that older workers lack the physical capacity to perform the job.[23] Both the experience of law and the social sciences run counter to this justification. In Appendix A of this brief there is a partial list of accomplishments past the age of 69. These speak eloquently of the irrelevance of chronological age to productive capacity. The scientific studies confirm this fact on a more mundane level. There has never been a judicial finding that older workers perform less well than younger workers, nor could there be.[24] The relationship between aging and ability to perform a job as measured in actual employment situations has been the subject of relatively few studies.[25] A Depart-

[23] Secretary of Labor W. Willard Wirtz reported to the Congress, in 1965, that "[p]hysical capability is by far the most important single reason advanced for imposing upper age limits on employment." *The Older American Worker—Age Discrimination in Employment, Report of the Secretary of Labor to the Congress under Section 715 of the Civil Rights Act of 1964* 8 (1965).

[24] In *Hodgson* v. *Greyhound Lines Inc.*, 499 F.2d 859, 865 (7th Cir. 1974), the Court found that "statistical evidence establishes that Greyhound's safest driver is fifty-five years of age and has sixteen years of experience as a Greyhound driver." In finding that a policy not permitting the *hiring* of drivers over age thirty-five did not violate 29 U.S.C. §623, the court emphasized both the high degree of risk to others, 499 F.2d at 863, and the extraordinary stress inherent in the particular tasks assigned to new employees. 499 F.2d at 864-65.

[25] Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1223, *Comparative Job Performance by Age: Large Plants in the Men's Footwear and Household Furniture Industries* (1957).

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ment of Labor study of office workers found that older workers perform as well as, and better than, younger employees.[26] Surveys of employers rating characteristics of older employees relative to younger employees found that older workers tend to be rated as equal or superior to those younger.[27] Those in positions to make hiring

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This study found a slight decrease in productivity among older workers.

Bureau of Labor Statistics, Dept. of Labor, Bull. No. 1273, *Comparative Job Performance by Age: Office Workers* (1960).

This study reported greater productivity by older workers.

Canadian Dept. of Labour, Economics and Research Branch, *Age Performance in Retail Trade* (1959).

This study found that older department store workers were equal to, or better than those younger, with peak performance at ages 51-55.

Clay, "A Study of Performance in Relation to Age at Two Printing Works" 11 Journal of Gerontology 417 (1956).

This researcher concluded that machine compositors and hand compositors showed a slight decline in productivity after age fifty, while older readers maintained a higher level of performance than younger ones until retirement.

Häkkinen, *Traffic Accidents and Driver Characteristics* (1958).

This study of Helsinki bus and tram drivers found no correlation between age and accidents.

Norman, "Professional Drivers and Road Safety" in *Proceedings of the Second Congress of the International Association for Accidents and Traffic Medicine* (1966).

This study of London bus drivers found the safest age range to be 60-64, with no significant decline for those older.

Palmer and Brownell, "Influence of Age on Employment Opportunities" 48 Monthly Labor Rev. 765 (1939).

These researchers found no correlation between age and output in surveying six New England companies.

Walker, "The Job Performance of Federal Mail Sorters by Age" 87 Monthly Labor Rev. 296 (1964).

This study of postal workers found a slight decrease, less than 10%, in performance after age 60.

[26] Dept. of Labor Bull. No. 1273, *Office Workers, supra.*

[27] Peterson, "Older Workers and Their Job Effectiveness" in *Gerontology* (C.B. Vedder, ed., 1963). This survey covered more than 3,000 older workers employed at 81 organizations.

decisions believe that older workers are capable of continued work.[28]

The results of these studies may not be conclusive, but they suggest that, if any age group characteristic is significantly related to job performance, then experience is the most significant variable in predicting worker effectiveness.[29] Despite the proved effectiveness of older workers and the absence of evidence of age-related incompetence, the myth that the physical capacity to perform a job necessarily declines with age persists.

Two clear errors underlie the belief in age-related job incapacity. The first is a misapplication of statistical data. Where individual differences within the two groups are greater than the average differences between those groups of younger and old persons, no general principle identified with the age of one group can be fairly applied.[30] Whatever biological changes occur as a result of aging vary greatly by individuals as to the *chronological* age at which these changes occur. Similarly, the degree to which these changes *affect* individuals varies, as do the individual's ability to compensate for them. The present state of health, the past health history and the life experience of the individual influence the biological effects of aging, if any, and what effect in production, if any, these physical changes produce. Chronological age indicates far less about an

[28] *Harris Survey, supra* at 213: 52% of those with responsibility for personnel decisions agreed with this statement—"Most older people continue to perform as well on the job as they did when they were younger."

[29] A. Heron and S. Chowan, *Ageing and the Semi-Skilled: A Survey in Manufacturing in Merryside, London* (1961).

[30] Schneider, "How Capable Are Older Workers?" in *The Older Worker* 33-50 (1962).

individual's potential performance than does any real test of functional capacity.

Confusing the effects of aging with the effects of diseases occurring among older people is the second error at the source of the stereotype. Ill health is a major cause for people leaving their jobs at all ages, young, middle aged, and old. Ill health always comes as an unexpected curse and can never be predicted on the basis of chronological age. A study of the careers of airline pilots indicates that the age of termination is related to the onset of medical problems, and *not* to advancing age.[31] The diseases popularly associated with old age, arteriosclerosis and senile dementia, are *not* consequences of normal aging.[32] The readiness with which people are willing to leave their job increases with their awareness of health problems, rather than as a direct function of increasing age.[33]

As a matter of law, disability has been determined on the basis of individual examination and review, and not on the basis of a general assumption. Just as exposure to hazardous conditions, or the occurrence of an industrial accident, are not sufficient to establish disability, the onset of advancing age should not be sufficient to presume ill health. Even if one could establish that older people are more prone to debilitating diseases than younger people, that still would not be a sufficient basis to discriminate

[31] McFarland, "Medical Fitness for Flying in Middle Aged Pilots," *Some Problems of Aviation and Space Medicine* 45-53 (1967). The court below, 376 F. Supp. at 756, found a similar pattern in considering the statistics kept on disability retirements from the Uniformed Branch—that there is no relation between approaching retirement age and incapacitating disability.

[32] Butler, "The Facade of Chronological Age," 119 Am. J. Psych. 721, 727-28 (1963).

[33] Jacobson, "Willingness to Retire in Relation to Job Strain," 13 Industrial Gerontology 65 (Spring 1972).

against healthy members of that class. To do so would allow discrimination whenever there existed a high correlation between an identifiable characteristic and ill health. Blacks are far more vulnerable than Whites to strokes and heart attacks.[34] Would that be a reasonable ground to exclude them from high risk employment as bus drivers, teamsters, airplane pilots or police? Cigarette smokers are more prone to a broad range of diseases than nonsmokers, but exclusion of all smokers from strenuous employment would be considered arbitrary and capricious. In the case of a cigarette smoker, the characteristic is voluntary and changeable. It is far more unfair to make an irrebuttable presumption concerning physical capacity on the basis of an immutable characteristic, such as race or age.

The National Institute of Mental Health (NIMH) has completed a long-term pilot study on aging in healthy older males.[35] The study used two groups of older persons (aged 65-91), one judged entirely healthy, or subject to trivial difficulties, after extensive medical examination, and the other characterized by more serious, though asymptomatic, illness, and a control group of younger persons.[36] The results of the study may be summarized as follows: there were "few significant age-specific differences in quantitative variables."[37] For example, in both pulmonary function and cerebral circulation metabolism, there were

[34] Among the population aged 45-64, the prevalence of heart disease for Blacks is more than twice that of Whites, while the prevalence of hypertension is approximately twice that of Whites. National Center for Health Statistics, U.S. Dept. of Health, Education and Welfare, *Health in the Later Years of Life* (1971) 18-19.

[35] J. Birren (and others, eds.), *Human Aging: A Biological and Behavioral Study* (1971) (hereinafter *Human Aging*).

[36] *Id.* at 13-14.

[37] *Id.* at 310.

no significant differences between the older healthy group and the younger group, while the less healthy group reported statistically significant impairment of those functions.[38]

The study did note differences in EEG patterns as a consequence of aging, but found no functional correlation to these changes.[39] The intellectual ability of the older group, as measured by the Wechsler Adult Intelligence Scale (WAIS), was superior to those of the younger group (in terms of verbal skills, while performance skills were slightly lower).[40] It has been found that there are no significant age differences in perceptual accuracy, though channel capacity is slightly below that of younger people.[41] Other studies support the conclusion that overall mental ability does not decline as a result of increasing age, but rather from cerebral vascular diseases and senile dementia.[42]

[38] *Id.*

[39] *Id.* at 312.

[40] *Id.*; see also, Bisdorfer, "The WAIS Performance of the Aged: A Retest Evaluation," in *Normal Aging* 208, 216 (E. Palmore ed. 1970).

[41] Christensen, "Interference in Memory as a Function of Age," XXIX *Dissertation Abstracts* 2216-B (1968).

[42] Birren, *Increment and Decrements in the Intellectual Status of the Aged*, Psychiatric Research Report 23, at 207, 213 (1968). Dr. Birren, who is Director of the Gerontology Center, University of Southern California, has recently summarized his research in the following manner:

> Because of my research background I have been involved in several policy discussions during my career about the use of chronological age as an index for retirement. This had involved a role as a consultant to the Federal Aviation Agency with regard to commercial airline pilots, the United States Army, and other groups. My own research has borne out the fact that given good health, there is little change in health, but not because of intrinsic processes that could be identified

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Normal aging does result in decreased speed in psychomotor function.[43] This refers less to automatic responses than to situations involving choice in perceptual, psychomotor or associative functions.[44] Novel and complex situations may present more difficulties, and require more time in which to respond, for older people. The quality of the response, though, is likely to be equal to, or better than, those of younger people.[45] Finally, these complex tasks are capable of being learned by older people to a point of equal quickness of response to those younger.[46]

The available data only partially validates the hypothesis that aging affects behavioral capacity. The process of aging in healthy individuals produces some measurable changes in biological functions. Even this narrow statement must be examined critically. Many functions remain unchanged by age, and only deteriorate from disease. Other changes, such as those measured by EEG, have *no* known effect on behavioral capacity. Some changes may

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with chronological age or aging. In particular, those areas of human capacities that depend upon the massing of experience, vocabulary, verbal comprehension, and reasoning show little direct dependence upon chronological age. Certain other processes do show a change with age, that is, those related to the speed of information processing, perception, and response. While certain skills may be influenced by the change in speed with age, they appear very remote from those qualities that would distinguish the experienced professional, the educator, or such activities as the writing of books. Memo from Dr. James E. Birren to Dr. James A. Peterson, January 26, 1971.

See also, n. 32.

[43] *Human Aging, supra,* at 313.

[44] Fozard, J. and Carr, G., "Age Differences and Psychological Estimates of Abilities and Skills," 13 Industrial Gerontology 75, 86 ff. (Spring, 1972).

[45] *Id.* at 94.

[46] *Id.*

be compensated for to retain a high level of capability; others may be statistically significant but of so small a degree as to be without practical effect. The methodology used, cross-sectional studies of groups of younger and older people, remains vulnerable to the historical differences in the experience of two different generations; only far more costly longitudinal studies can establish with certainty the effect of aging on culture-bound human capabilities.

Even if the functional effects of aging could be established with certainty, it would remain to be demonstrated that these effects are crucial to job performance. If an older worker has slower tested response time of a specific sort, yet is able to compensate for this on the job by greater foresight and concentration, job performance may be the same or even better than that of a younger employee.[47] Clearly any demonstrable diminution of ability must be actually demonstrated to affect total productivity as it may be either irrelevant (such as not being able to lift 50 pounds when the job never requires more than 25 be lifted), or compensated for (as is the case for bus drivers).

B. *The Rationale That Older Workers' Abilities Cannot Be Assessed, Thus Necessitating an Indiscriminate Rule Requiring Retirement, Is Without Merit*

Appellants, while acknowledging "that a mandatory retirement plan involves the inevitable loss of individual public employees who remain willing and able to work beyond the prescribed retirement age," App. Br. at 19,

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[47] The job of bus driver would seem to require many of the basic physical and psychological skills which have been shown to decline with age, such as reaction time and night vision. Yet, studies of bus drivers have revealed that older drivers are at least as safe, and sometimes safer, than younger drivers. See, *Hodgson* v. *Greyhound Lines, Inc., supra,* n. 24, and Norman, *supra,* n. 25.

maintain that "substituting individual determinations of fitness for an across-the-board approach would carry with it enormous difficulties which defy judicial adjustment." App. Br. at 20.

> Essentially, state and federal legislatures have chosen to avoid the depressing and demeaning task of determining, on a case-by-case basis, when an individual has reached an elusive point of diminished productivity. The use of a single line avoids the psychological destruction inherent in an individualized judgment process and provides a sense of certainty to one's career in public service. App. Br. at 20.

People are hired; people are promoted; people are demoted; people are fired. All these acts require the judgments of employers and may cause pain to some or many workers. Why is the firing on the excuse of chronological age in any way a different situation?

Perhaps the feelings of a few who are fired at the particular arbitrary age who ought to be fired on merit appreciate being protected (for the first time in their life) from such critical judgment, for the few who might prefer being told they are too old rather than being confronted with the claim that they are incompetent, there are opposed the many others who properly object that they don't want to be fired because they are too "old" and therefore presumed worthless.[48]

Large firms employing more than 500 people are far more likely to use mandatory retirement policies than small firms employing less than 100 people.[49] The personnel

[48] See *Harris Survey, supra,* at 211, cited, *supra,* n. 11.

[49] F. Slavick, *Compulsory and Flexible Retirement in the American Economy* 36 (1966).

practices of larger firms are far more impersonal and bureaucratic than those of smaller firms. If mandatory retirement were a rational means to reduce the "psychological destruction" of determinations of incompetence, it would be far better suited to the closer contacts of the smaller firm. As the actual practice of organizations is exactly opposite, it seems unlikely that mandatory retirement is a rational means to aid either employers or employees in the decision to terminate employment.

Appellant's first argument, that individual determinations of functional ability (and its occasional relationship to chronological age) cannot be made, must be considered in the light of the available scientific evidence.

Two methods for testing functional job capacity have been used in this country. The Hanman method[50] and the GULHEMP method.[51] Both methods begin with the concept of relating task analysis to medical testing. The potential employee is tested to determine his physical capabilities; the job for which he is being considered is analyzed to determine its physical requirements. The capabilities are matched against requirements to determine job eligibility.

[50] American Mutual Liability Insurance Company, *Physical Abilities to Fit the Job: How to Determine a Worker's Physical Abilities and Relate Them to Job Demands, Safety and Productivity* (1968).

Hanman, "The Evaluation of Physical Ability," 258 New England Journal of Medicine 986 (1958).

L. Koyl and P. Hanson, *Physical Ability and Work Potential* (1969).

McFarland and O'Doherty, "Work and Occupational Skills," in *Handbook of Aging and the Individual* (J. Birren, ed.) 459-466 (4th ed. 1967).

[51] Batten, "Application of a Unique Industrial Health System," Industrial Gerontology 38 (Fall 1973).

L. Koyl, *Employing the Older Worker* (1973).

Koyl and Hanson, *supra.*

The Hanman method records the physical and environmental requirements of jobs and the physical abilities of potential employees in units of time for eighty specific factors.[52] A physician evaluates the employee, and an in-

[52] McFarland and O'Doherty, *supra*.

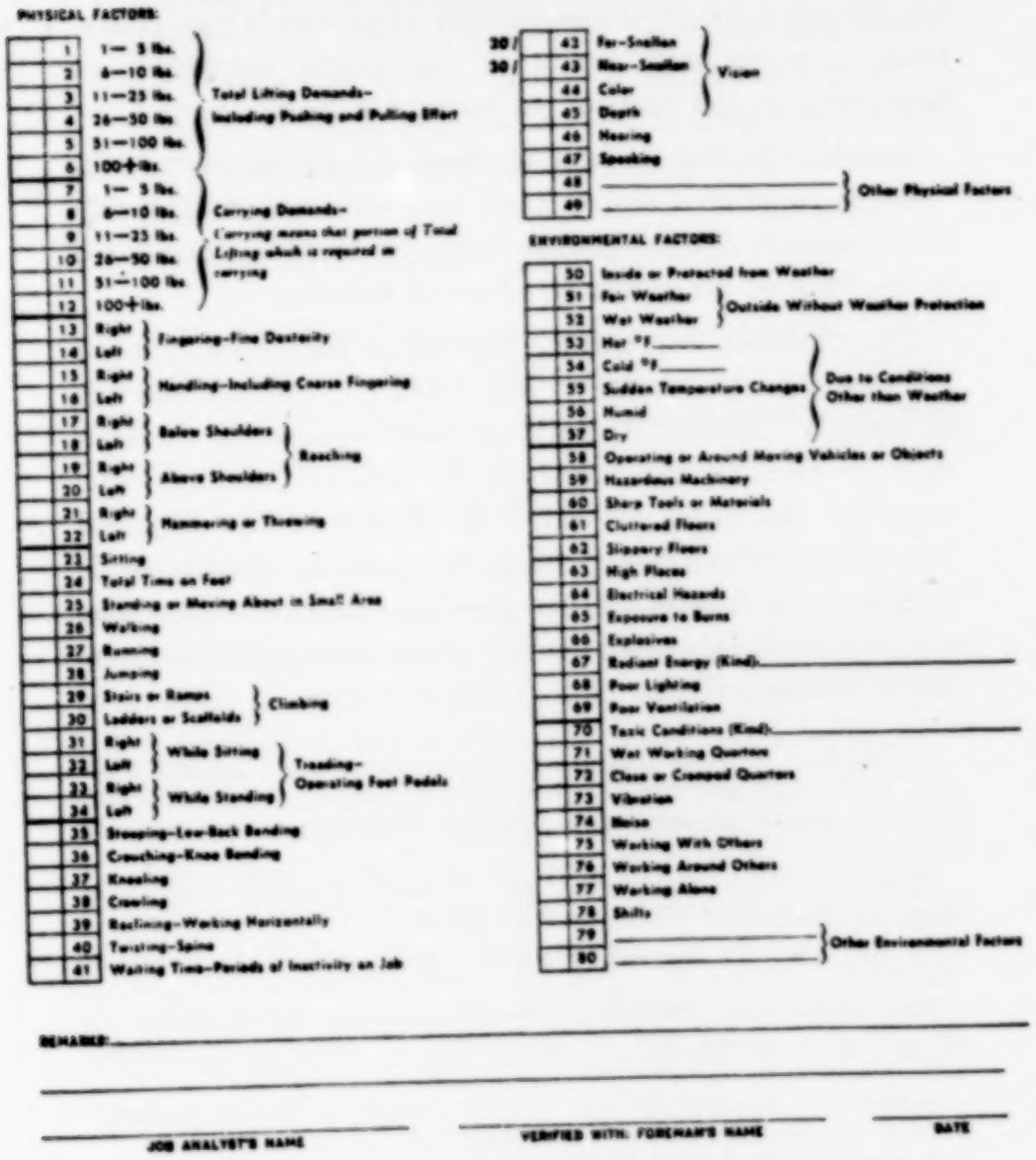

FIG. 5.—Chart showing Profile of Physical Demands. (From Hanman, 1958.)

dustrial engineer, the demands of the job. The comparison of the Profile of Physical Abilities with the Profile of Physical Demands, along with interviewing and other traditional personnel techniques, is then used to place the worker. Modifications of this technique include shortening the number of factors evaluated, and including mental and emotional factors in the evaluation.

The GULHEMP method tests seven variables, General physical condition, Upper extremities, Lower extremities, Hearing, Eyesight, Mentality and Personality, and rates the results on a 1-7 scale, with one being perfect function and seven being total incapacity. The jobs within an organization are analyzed to determine minimum ratings for each of the above variables. After an applicant is tested, the result chart is matched against the requirement chart to determine physical capability for the job.[53]

[53] Batten, *supra* at 47.

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FIGURE 2

Worker X — — — — — Job Requirements

OTE: Matchings of workers' abilities to job requirements are rarely isomorphic. As ng as capacity does not exceed requirements too greatly, effective performance may expected.

GULHEMP was developed for a period of 16 years at the deHavilland Aircraft Plant in Canada. It has been tested on a broad scale in Portland, Maine, by the Maine Employment Service.[54] The results may be summarized as follows:

> —testing and use of the five physical variables was more precise and reliable than mental and personality variables.[55]
>
> —80.7% of workers 55 and over were found to have physical capabilities compatible with job requirements; 63% were employed.[56]
>
> —those employed by GULHEMP testing used significantly less sick leave than those employed prior to the use of the method, indicating a greater harmony between capacity and requirements than through use of traditional personnel practices (among them chronological age discrimination).[57]

The demonstrated worth of GULHEMP validates the concept of matching individual capacity to job requirements. Social science research continues to refine its capability to measure accurately both the physical indicators

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[54] Quirk and Skinner, "IHCS: Physical Capacity, Age and Employment," Industrial Gerontology 49 (Fall 1973).

[55] In the case of retaining, rather than hiring of new employees, these tests should be less crucial. Furthermore, these variables are more easily tested in relation to specific job situations rather than for a general population as in the Maine experiment.

[56] Quirk and Skinner, *supra* at 60, 61.

[57] .36% v. 4.29% of work time on sick leave. Levine, "IHCS: Benefits & Costs to Industry," Industrial Gerontology 63, 65 (Fall 1973).

of biological function and the physical requirements of job tasks.[58]

Task analysis has been a continual interest of industrial engineers and personnel managers in the pursuit of greater job efficiency.[59] Although they may not be translated into terms of underlying biological functions, all jobs listed in the D.O.T. have been analyzed in terms of basic functional requirements, and most organizations have specific functional criteria for job positions.[60]

The stereotypes concerning the performance of older workers have no scientific validity. The means exist to make accurate determinations of worker capability at any age. What rational justification can there be for an incorrect presumption rather than a precise individual determination as a means for predicting job performance? The Court below suggested that the inability of tests to make accurate assessments might justify applying a general presumption. 376 F. Supp. 755-56 (D. Mass. 1974). In the instant case both aspects of determining job qualification are capable of precise determination.

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[58] See, for measurement of functional capacity:

J. Dirken, *Functional Age of Industrial Workers* (1972).

Bouruere, "Assessing Biological Age" in *Processes of Aging* (Williams, Tibbits and Donahue eds. 1963) 184-195.

A. Heron and S. Chowan, *Age and Function* (1967).

Each of these studies developed, and applied, a method for testing functional capacity that would be both highly predictive and economically feasible. (Generally, the method used is to test all variables, and then find correlations that will be used to choose more easily testable functions.)

[59] See for analysis of job requirements: N. Nelson, *Technical Training Guide for Physical Demands Analysis* (1973).

[60] U.S. Dept. of Labor, Manpower Administration, *Handbook for Analyzing Jobs* (1972).

The physical and psychological capabilities necessary to perform competently as a ranking state policeman include physical strength, stamina, alertness and coping with psychological stress.[61] All of the physical qualities are readily testable to a high degree of precision. The psychological capacity may not be subject to as exact a measurement, but this presents neither practical nor legal difficulties.

Stamina, or the capacity to do physical work at a given level for a given period of time, is readily tested by using a bicycle ergometer and attached devices to measure the effect of exertion on biological function (breathing frequency, heart frequency, and vascular resistance).[62] The results of these tests can be compared to the functional requirements established by the state as necessary to the position of a police commander. For the sample group of industrial workers studied, there was no significant diminishment of stamina at age fifty.[63]

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[61] App. Br. at 9, 23.

[62] Dirken, *supra* at 54.

[63] *Id.* at 56. Most measurements show a steady decline from age 30, with only two measurements showing a dramatic decline at any point, that being ages 60-64. At age 55-59, the following % decline from age 30 capacity are indicated:

7% systolic maximum (a measure of vascular resistance)
12% breath frequency
16% heart frequency
23% maximum oxygen uptake
26% maximum exertion capacity

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The qualities of alertness and strength are similarly determinable to a high degree of precision. Both the testing method, and the results of cross-sectional studies, are readily available. Alertness is essential to airplane pilots, and was a key variable in a study of the relation of age to performance which concluded that individual determinations of fitness for airline pilots over age sixty are possible, accurate and safe.[64] *A fortiori,* it is possible to determine a less precise measure in a less risky situation,

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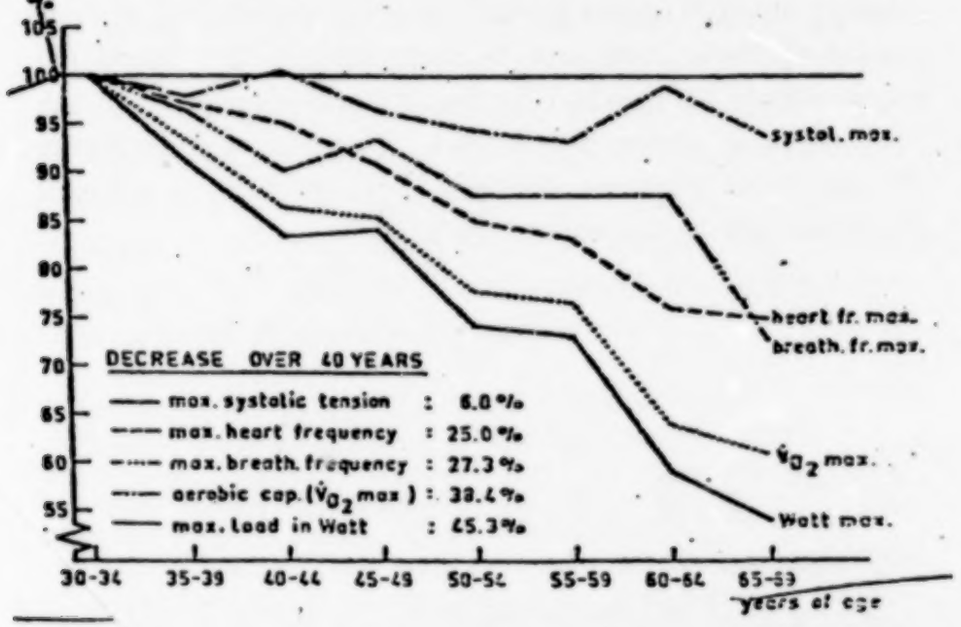
Fig. 4 Decrease of ergometric variables over 40 years



See also, Robinson, "Experimental Studies of Physical Fitness in Relation to Age," 10 Arbeitsphysiologie 251 (1938), cited in McFarland, "The Need for Functional Age Measurement," Industrial Gerontology 1 (Fall 1973).

[64] McFarland (1973), *supra* at 6-7; see also, McFarland, "Aging and Efficiency in Airmen," *Human Factors in Air Transportation, Occupation, Health and Safety* 369-401 (1953).

as is the case for a state police commanding officer. Physical strength is the most easily measured of all these variables,[65] though its rational relationship to the duties of a commanding officer is not very clear.

The capacity to cope with the stresses of a command position presents a different type of problem.[66] First, there is no evidence to indicate *any* deterioration of intellect or personality around the age of fifty, sixty, seventy, etc.[67] Indeed, in terms of experience, personality development and knowledge, this may be the prime of an individual's decision-making capacity.[68] As a society we act according to this wisdom, entrusting most crucial decision-making positions, with their attendant stress, to men aged fifty, sixty, seventy, etc. (See Appendix A to brief.) Indeed, it is unusual for a person of less than that late "middle-age" to have the full burden of responsibility in any organization operating on a nationwide, or even a state-wide, scale.

Even if there were a decline in an individual's capacity to deal with this type of psychological stress, there is no reason to believe that standard psychological tests would lose validity at the age of fifty, or that the significant

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[65] A. Damon, H. Stoudt, and R. McFarland, *The Human Body and Equipment Design* (1966), cited in McFarland (1973), *supra* at 6.

[66] See, in general, A. Welford and J. Birren (eds.), *Decision Making and Aging, Interdisciplinary Topics in Gerontology, v. 4* (1969).

[67] N. 40, *supra.*

[68] Welford, "Age and Skill: Motor, Intellectual and Social," in Welford and Birren, *supra* at 18.

degree of change would fall below the measuring capacity of those tests. These measures taken to protect the individual and the public from the harmful effects of psychological stress upon a forty year old commanding officer should be entirely adequate to deal with a fifty, sixty, seventy, or eighty year old officer. The common practice of the overwhelming majority of organizations in this country is to promote individuals in their fifties to positions of greater responsibility with full awareness of increased psychological stress. If, contrary to this, appellant believes fifty is the age when people tend to be less able to handle the stress of a leadership position, or when it is no longer possible to predict accurately an individual's capacity to handle stress, appellant should be required to demonstrate a reasonable basis for this belief.

VI.

CONCLUSION

Emerson wrote: "A man's years should not be counted until he has nothing else to count." In more recent times Simone de Beauvoir has written:

> A man's aging and his decline always take place inside some given society, it is intimately related to the character of that society and to the place that the individual in question occupies within it. S. de Beauvoir, *The Coming of Age* 56 (1973).

If the mark of individual integrity and happiness, and of society's treatment of its members, are to be measured for the older men and women in this nation, the conclusion

must be that ours is a nation sadly at odds with itself. We exalt youth, and demean old age. We commend productivity and creativity, and then cut off those who are still able to produce and to create. We deplore poverty, and condemn the old to its ravages. We mouth respect for the individual, and use pernicious generalizations to victimize the many.

Were this the sum total of the matter, we could all join in shared regret and outrage. But there is more. Mandatory retirement not only offends the generalized notions of equity which we share. It further violates the guarantees of the Due Process and Equal Protection Clauses of the Fourteenth Amendment. It is the mandates of these clauses which invite the attention—and action—of this Court. They compel only one conclusion—mandatory retirement is unconstitutional.

Exclusion by mandatory retirement has no rational basis, infringes basic rights and applies generalizations to exclude without particular proof. This Court has seen fit to strike down discriminations on the basis of race, social poverty, travel, religion and family. Mandatory retirement with these profound constitutional infirmities is justified only by an abstract unsupported claim of statistical inference, which this brief has effectively rebutted. The time has come for this Court to discard yet another invidious distinction unjustly applied to many American who need the protection of their Constitution and its Bill of Rights.

For the foregoing reasons, *amici* American Civil Liberties Union, National Council of Senior Citizens, Inc., Legal Services for the Elderly Poor, and Massachusetts Civil

Liberties Union Foundation respectfully urge this Court to affirm the judgment below.

Dated: September 3, 1975

Respectfully submitted,

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APPENDIX

APPENDIX A

Accomplishments Past the Age of 69 (1975)

I. Architecture

Walter Gropius 1883-1969	Active member of The Architects Collective until death at 86; U.S. Embassy in Athens at 77.
Louis Kahn 1901-1974	Yale Mellon Center for British Studies at 71.
LeCorbusier (Charles-Edouard Jeanneret) 1887-1965	La Tourette Monastery at 73; Chandigark, India at 75.
Mies van der Rohe 1886-1969	Seagram Building at 70; National Gallery, Berlin 76-82.
Frank Lloyd Wright 1869-1969	Baghdad Opera at 88; Guggenheim Museum completed at 90.

II. Art

Giovanni Lorenzo Bernini 1598-1680	Ponte Sant'Angela; Tomb of Alexander VII; one of the designers of St. Peters; Altieri Chapel with death of the Blessed Ludovicia Albertoni.
Marc Chagall 1887-	Painter active into 80's.
Salvador Dali 1904-	Surrealist still active at 71.
Marcel Duchamp 1887-1968	Painter active until death at 81.
Max Ernst 1891-	Painter active into 80's.
Vasili Kandinski 1866-1944	Russian post-impressionist painter who founded new abstract school with Paul Klee; active until his death at age 78.
Michelangelo 1475-1564	Greatest works up to time of death at 89.

Joan Miro 1893-	Painter, sculptor, still active at 78.
Grandma Moses (Anna Moses) 1860-1961	Began to paint at 72.
Pablo Picasso 1881-1973	Still active past 90.
David Siquieros 1896-1974	Mexican muralist active until death at 78; "March of Humanity" (50,000 sq. ft. mural) executed in 70's.
Edward Steichen 1879-1973	Photographer, Director Emeritus of Department of Photography, Museum of Modern Art; edited *The Family of Man* at 76; one man exhibit at MOMA at 82.
Tintoretto (Jacopo Robusti) 1518-1594	Worked until death at 81.
Titian 1477-1576	Portraits of Pope Paul III; completed Pieta immediately before death at 99.

III. Business and Labor

Bernard Baruch 1870-1965	73 when wrote report on post-war conversion of American economy; appointed to U.N. Atomic Energy Committee at 76.
Harry Bridges 1900-	Labor leader, still active at age 75.
Cyrus Stephen Eaton 1883-	Published: Is the Globe Big Enough for Capitalism and Communism? at 75; Canada's Choice at 76; The Engineer As Philosopher at 78; holds nine directorships; Trustee, Denison University; University of Chicago.
Alfred Fuller 1885-1973	Chairman of Board of Fuller Brush Co. at 83.
Cary Grant 1904-	Head of Faberge Perfumes at 71.
John L. Lewis 1880-1969	President of United Mine Workers of America from age 40 to 80.

George Meany 1894-	President of AFL-CIO at 81.
Bill Rickets	Present Chairman of Chappel's, the international music firm, age 90.
Col. Sanders (fried chicken)	Started at 66; now 82.

IV. Cinema

Luis Buñuel 1900-	Director, still active at 75; directed Tristana at 70; The Petit Charm of the Bourgeoise at 72; The Phantom of Liberty at 74.
Charlie Chaplin 1889-	Published My Autobiography at 75; wrote and directed "A Countess From Hong Kong" at 78.
Vittorio de Sica 1902-1974	Directed *Garden of Finzi-Continis* at 70; *Brief Vacation* at 71.
Alfred Hitchcock 1899-	Motion pictures and television producer; still active at 76; *Frenzy* at 73.
Jean Renoir 1894-	Directed C'est La Revolution at 73; La Petit Theâtre de Jean Renoir at 77.

V. Education

William Benton 1900-1973	Publisher of 15th Edition of Encyclopedia Britannica at 73.
James Bryant Conant 1893-	Thomas Jefferson and the Development of American Public Education at 69; The Education of American Teachers at 70; Two Modes of Thought at 71; Shaping Educational Policy at 71; The Comprehensive High School at 74; My Several Lives—Memoirs of a Social Inventor at 72.
Sir Alan Gilbert	Continues to teach (Drew University) at 82; since retirement at 69, has written, translated or edited six books and published 17 scholarly articles.
Noah Webster 1758-1843	Published American Dictionary of English Language at 70; published a revision of the Authorized Version of the English Bible at 75.

René Wellek 1903-	Working on 5th volume of History of Modern Criticism at 72.

VI. Fiction and Poetry

Melville Cane 1879-	At 92, a practicing lawyer; commissioned to write commemorative poem for Phi Beta Kappa's bicentennial in 1976; author of Make a Poem at 74; And Pastures New at 77; Bullet-Hunting at 81; To Build A Fire at 85; So that It Flower at 87; All and Sundry, autobiography published at 89; co-editor The Man From Main Street, at 74; The Golden Year at 81.
Agatha Christie 1890-	Mystery writer, active at age 85, 14 novels after age 69.
Jean Cocteau 1891-1963	Writer, poet.
Noel Coward 1899-1973	Playwright.
T. S. Eliot 1888-1965	On Poetry and Poets at 69; The Elder Statesman at 70; Collected Poems (1909-62) published at 75.
Robert Frost 1874-1963	From age 69-75, Ticknor Fellow in Humanities at Dartmouth; Ambassador of Good Will to South America at 80, Israel and Greece at 87, Russia at 88; Congressional Gold Medal at 88; represented the Arts at John F. Kennedy's inauguration at 87; wrote a Masque of Reason at 71; Steeple Bush at 73; A Masque of Mercy at 73; In the Clearing at 87.
Johann Wolfgang von Goethe 1749-1832	Second part of Faust completed at 82.
Pär Lagerkvist 1891-1974	Pilgrim at Sea at 71; Marianne at 78.
Melchior Lengyel	Playwright, still active at age 92.
Marianne Moore 1887-1972	Poet, active until death at age 85.

Vladimir Nabokov 1899-	Novelist still active at 76; *Ada* at 70; *Glory* at 72.
Ezra Pound 1885-1972	Latest installment of the Cantos at 74; Sophoclean Translation, The Woman of Trachis at 71; Translation of the Classic Anthology Defined by Confucius at 69.
George Ryaal (Audax Minor)	Writes a weekly column on horse racing for the New Yorker at age 80.
Rex Stout 1886-	Writer of mystery novels, 91.
Mark Twain (Samuel Clemens) 1835-1910	Active until death at 75; What is Man?, Eve's Diary at 71.
Thornton Wilder 1897-	Novelist & Playwright; The Eighth Day at 70; Theosophilus North at 76.
Walt Whitman 1819-1892	Good-bye, My Fancy at 70.
P. G. Wodehouse	Author of 23 novels after age 69.

VII. Government and Heads of State

Konrad Adenauer 1876-1967	Chancellor of West Germany, 73-87.
King Gustaf VI Adolf 1882-1973	Ruler of Sweden until 91.
David Ben-Gurion 1886-1973	Prime Minister and Minister of Defense from Israel's formation at 62 to 77; Member of Knesset from 77 to 79.
Sir Alexander Bustamante 1884-	Prime Minister at 78; active politically at 91.
Winston Churchill 1874-1965	Leader of wartime government at 71.
Georges Clemenceau 1841-1929	Prime Minister of France during World War I at 76.
Chiang Kai-Chek 1887-1975	Head of Nationalist Chinese Government on Formosa until 88.
Chou En Lai 1898-	Premier of China at 77.

Charles De Gaulle 1890-1970	President of France for over 20 years until age 79.
Sam Ervin 1896-	Chaired Senate Watergate Committee at 76.
Francisco Franco 1892-	Spanish head of state at 83.
Benjamin Franklin 1706-1790	Delegate to Second Continental Congress in 69th year; one of five drafters of Declaration of Independence at 70; afterwards Ambassador to France until 79; attended Constitutional Convention of 1787 at 81.
Gandhi 1869-1948	Arrested at age 73 as leader of Indian Independence Movement; active till death at 79.
Malana Hamid	Bangladesh opposition leader at age 90.
Paul Hoffmann 1891-1974	U.N. administrator; managing director of U.N. Special Fund till 75; of U.N. Development Program till 83.
Ismet Inonu 1884-1973	Re-elected prime minister of Turkey at 77, served to 81; leader of opposition party until 88.
Jomo Kenyatta 1893-	President of Kenya from age 70, now 82.
Jawaharlal Nehru 1889-1964	Prime minister of India until death at 75.
Pope Paul VI 1897-	Elected at 66, now 78.
Sarvepalli Radhakrishnan 1885-1975	President of India until 79.
Samuel Rayburn 1882-1961	Speaker of the House at 78.
Eisaku Sato 1901-	Prime Minister of Japan at 70; President of Liberal Democratic Party at 73.
Emperor Haile Selassie 1891-1975	Ruler of Ethiopia until deposed at 83.

Marshall Jossip Broz Tito 1892-	President of Yugoslavia at 83.
Mao Tse-Tung 1893-	Chairman People's Republic of China at 82.
Eamon de Valera 1882-1975	President of Ireland until age 91.
Walter Ulbricht 1893-1973	Chairman of DDR Communist Party until 78.

VIII. Presidents of the United States

James Buchanan 1791-1868	Inaugurated at 65; 69 at end of term.
Dwight Eisenhower 1890-1969	Inaugurated at 62; 70 at end of term.
Andrew Jackson 1767-1847	Inaugurated at 61; 70 at end of term.
Harry S. Truman 1884-1973	33rd President; 69 at end of term; active until 89.

IX. Historians and Political Theorists

W.E.B. DuBois 1868-1963	Professor at Atlanta University until 76; Founder of Phylon magazine at 72; politically active until death at 95; *Dusk at Dawn* at 72.
Will Durant 1885-	The Story of Civilization: Vol. VI, The Reformation at 72; Vol. VII, The Age of Reason Begins (with Ariel Durant) at 76; Vol. VIII, The Age of Louis XIV (with A. Durant) at 78; Vol. IX, The Age of Voltaire (with A. Durant) at 80; Vol. X, Rousseau and Revolution (with A. Durant) at 82; The Lessons of History (with A. Durant) at 83; Interpretations of Life (with A. Durant) at 85; History of the Revolutionary Years 1640-1660.
Thomas Hobbes 1588-1679	Continued writing and publishing until death at 91.
Alexander Kerensky 1881-1970	Provisional Government of 1917 In Documents—3 volumes at 80; Russia and History's Turning Point at 84.

Samuel Eliot Morison 1887-	Eminent American historian; 14 books after age 69, including Pulitzer Prize; *The European Discovery of America: The Southern Voyages* at 87.

X. Journalists

Arthur Krock 1886-1974	Journalist, retired from Times Washington Bureau at 80; 4th Pulitzer at age 89.
Walter Lippmann 1889-1974	Pulitzer prizes at 69 and 73; Overseas Press Club Award; active daily columnist until age 78, and occasional contributor to Newsweek until 82.

XI. Law

A. *Judges*

Tanaka Kotaro 1890-1974	Chief Judge, Japanese Supreme Court to age 70; served on International Court of Justice in The Hague, ages 71-79.

Chief Justices of Supreme Court

Melville Fuller 1888-1910	Age at installation, 65; age at end of term, 77.
Charles E. Hughes 1862-1948	Age at installation, 63; age at end of term, 79.
John Marshall 1755-1835	Age at installation, 46; age at end of term, 80.
Harlan Stone 1872-1946	Age at installation, 69; age at end of term, 74.
William H. Taft 1857-1930	Age at installation, 64; age at end of term, 73.
Roger Taney 1777-1864	Age at installation, 59; age at end of term, 87.
Morrison Waite 1816-1888	Age at installation, 58; age at end of term, 72.
Earl Warren 1891-1974	Age at installation, 62; age at end of term, 78.
Edward White 1845-1921	Age at installation, 65; age at end of term, 76.

Present Supreme Court

William O. Douglas 1898-	Age at installation, 41; now age 77.

Judges

Hugo Black 1886-1971	Age at installation, 51; age at end of term, 85.
Louis Dembitz Brandeis 1856-1941	Age at installation, 60; age at end of term, 83.
Learned Hand	On the bench until 79.
John Marshall Harlan 1899-1971	Age at installation, 41; age at end of term, 71.
Oliver Wendell Holmes 1841-1935	Age at installation, 61; age at end of term, 91.
Judge Harold Medina 1888-	Senior Judge in the Second Circuit at 83.

As of 1975, 47 Senior Circuit Court Judges and 102 Senior District Court Judges active in Federal Judiciary.

B. *Lawyers*

Herman Arthur Fischer	Chairman of the Board, Gary-Wheaton Bank from age 70 to age 84; active in law practice at age 90.
Sam Markewich 1882-	Practicing lawyer at the age of 87.

C. *Professors*

Paul E. Basye (Hastings) 1901-	At 69, 2nd edition Clearing Land Titles.
William Wirt Blume (Hastings) 1893-	At 70, aid in preparation of Michigan Civil Procedure; two extensive articles, Hastings Law Journal at 73 and 77.
Jerome Hall (Hastings) 1901-	"Archives for Philosophy of Law and Social Philosophy" at 69; "Legal Thought in the U. S. A. under Contemporary Pressures"; "Justice in the 20th Century", soon to be published; "Jurisprudential Theories and the

	Effectiveness of the Law", to be published in *Nomos;* will present paper to American Society for Political and Legal Philosophy at annual meeting.
Frederick Kessler 1901-	Educator and law professor.
Norman D. Lattin (Hastings) 1894-	Recently, new edition of text on *Corporations.*
Frederick J. Moreau (Hastings) 1893-	*After Age 70:* Two large supplements to two-volume work which appeared initially in 1957; two surveys of California Law, 140 pages total; just agreed to do 3rd supplement to above.
George E. Osborne (Hastings) 1893-	2nd edition of text on *Mortgages* at 77; *Cases on Suretyship* at 73; *Cases on Secured Transactions* at 74.
Rollin M. Perkins (Hastings) 1889-	Cases on Criminal Law and Procedure (3rd ed.) at 77; Perkins on Criminal Law (2nd ed.) at 80; "The Vagrancy Concept", 9 Hast. L. J. 237 at 69; "Collateral Estoppel in Criminal Cases", at 71, at U. of Ill. L. J. 533; "Analysis of Assault and Attempts to Assault", 47 Minn. L. R. 71 at 73; "Corpus Delecti of Murder," 48 Va. L. R. 173 at 73; "Alignment of Sanction with Culpable Conduct", 49 Ia. L. R. 325 at 75; "Some Weak Points in the Model Penal Code", 17 Hast. L. J. 3 at 76; *Book Reviews:* Glueck: Roscoe Pound and Criminal Justice, 11 N. Y. Law Forum 725 at 77; Packer: Limits of the Criminal Sanction, 15 N. Y. Forum 442 at 79.
Roscoe Pound	Professor at Harvard Law School from 66 to 77; after age 77, active in numerous legal, editorial and educational positions, including a reorganization of the Nationalist Chinese Judicial System.

Richard R. Powell (Hastings) 1890-	*Books:* Abridgement of Treatise on Real Property (with P. J. Rohan) at 78; Wills and Trusts (preliminary edition of Columbia and Michigan—3 installments—1959, at 69; Truncated Readings in the Law of Future Interests for California, 1 vol., 1962, at 72; *Articles:* "Perpetuities in Arizona", Ariz. L. R. 225 (1959) at 69; "Perpetuities", Encyclopedia Britannica (1959) at 69; "Relation Between Property Rights and Civil Rights", 15 Hast. L. J. 135; "Race and Property", Diablo Press, 1964 at 71; "New Powers of Appointment Act", 103 Tr. & Est. 807 (1964) at 74; "Rac. Dis. in Housing in Cal.", 18 Va. L. R. W. (1965) at 75; "Alaskan Earthquake of 1964", 18 Hast. L. J. 365 (1967); "Freedom of Alienation—For Whom", 2 Real Orio, Oribate & Trust J., 127 (1967) at 77; "Powers of Appointment in Cal.", 19 Hast. L. J. 1281 (1968) at 78; "Elliot E. Cheatham—Gentleman", 22 Vand. L. J. 16 at 78; "Law and Its Impact on the Family (for Law wives of Hastings) at 78; "The Growth of the Law" (ed.), at 80; "How Free Is It Socially Desirable . . . ", Record, Assn. of Bar, City of New York at 81.
	In addition: 24 addresses given since 1960 (since age 70); *Book Reviews:* Scott Abr. 46 Corn. L. Q. 375 at 71; Dietz, In Defense of Property, 17 Stan. L. R. 779 at 75; Anderson, Amer. Law of Zoning (4 vols.), 20 Hast. L. J. 1163 at 79; *Three studies* made for New York Law Revision Commission at 72, at pp. 487-99, 515-20, 603-04; *Study* for Cal. Law Revision Commission at 77; "Powers of Appointment, With Proposed Draft Statute."
William L. Prosser (Hastings) 1898-1974	*After age 70:* 3rd edition of text on *Torts;* Reporter of new *Torts Restatement.*

Lewis M. Simes (Hastings) 1889-	Improvement of Conveyancing by Legislation at 71 (with C. E. Taylor); Model Title Standards at 71 (with C. E. Taylor); Handbook for More Efficient Conveyancing at 72; 2nd ed. Handbook of Future Interests at 77; "Perpetuities in California Since 1951" (Hast. L. J. 1967) at 78.
Roscoe T. Steffen (Hastings) 1893-	"The Private Placement Exemption", 30 U. Chi. L. R. 211 at 70; Cases on Commercial and Invesement Paper, 3rd ed. at 71; "Enterprise Liability: Some Exploratory Comments", 17 Hast. L. J. 165 at 72; "Private Placements Should Be Registered", 43 N. C. L. R. 548 at 72; Cases on Agency-Partnership, 3rd ed., at 76.
Clarence M. Updegraf	At 73, Article, 17 Hast. L. J. 473; at 77, 3rd ed. of Arbitration and Labor Relations; published, at 78, book review of Labor Relations Between Public Employees and Employers (Sullivan).
Harold E. Verbal (Hastings) 1902-	At 69, new edition of book on Community Property.

XII. Music and Dance

George Balanchine 1904-	Director and chief choreographer of New York City Ballet at 71.
Karl Boehm 1894-	Conductor, still active at 81.
Nadia Boulanger 1887-	Still active teaching musical composition at 88.
Pablo Cassals 1876-1973	Active past the age of 90.
Rudolf Friml 1879-	Active as composer and pianist past 90.
Martha Graham 1894-	Active as choreographer at 81; active as dancer until 78.
Franz Joseph Haydn 1732-1809	Composer, active until his death at age 77.

Otto Klemperer 1885-1973	Active as conductor until age 87.
Joseph Krips 1896-1974	Conductor, active at age 76.
Jean Philippe Ramean 1683-1764	Last great operas from age 74-77.
Artur Rubenstein 1889-	Pianist still active at 86.
Charles Camile Saint-Saens 1835-1921	Wrote a number of operas from age 69-76; a series of works for wind instruments and piano from 80 to 86.
Leopold Stokowski	Conductor of the American Symphony Orchestra at age 90.
Robert Stoltz	Composer, active at age 91.
Igor Stravinsky 1882-1971	Composer, active until his death at age 88.
Georg Phillipp Telemann 1681-1767	Finest musical works when over 80.
Arturo Toscanini 1867-1957	Conducted until age 87.
Giuseppe Verdi 1813-1901	Opera composer, completed Otello at 72, Falstaff at age 80.

XIII. Philosophy

Henri Bergson 1859-1941	Deux Sources de la Morale et da la Religion at 71; La Pensee et le Mouvant at 73.
Brand Blanchard 1892-	Educator and Philosopher; at 70 visiting prof. at U. of Minn. and pub. Reason & Analysis.
Franz Brentano 1838-1917	Aristoteles Lehre vom Ursprung at 73; Kategorienlehre from 73-76; Versuch uber die Erkenntnis until death.
Ernst Cassirer 1874-1948	"Essay on Man" at 70; Myth of the State at 71 (died at 71).

John Dewey 1859-1952	Common Faith at 75; Logic, The Theory of Inquiry at 79.
Charles Hartshorne 1897-	Educator and Philosopher.
Martin Heidegger 1889-	Unterweis zur Sprache at 70; Nietzsche at 72; Die Frage Nach Dem Ding at 73; Kants These Uber das Sein at 74; Die Technik und die Kehre at 74.
William E. Hocking 1873-1966	Meaning of Immortality in Human Experience at 84.
Immanuel Kant 1724-1804	Religion within the Limits of Reason Alone at 69; Eternal Peace at 71; from 71-80, six works at 816 total pages.
Horace Meyer Kallen 1882-	Educator and Philosopher. Distinguished Seminar Professor at Long Island University from age 82 to 86; *Published:* Secularism is the Will of God, at 72; Cultural Pluralism and the American Idea, at 74; Utopians at Bay, 76; The Book of Job as Greek Tragedy, at 77; A Study of Liberty, at 77; Philosophical Issues in Adult Education, at 80; Freedom, Tragedy, and Comedy, at 81; Laughter and Tears, at 86.
C. I. Lewis 1883-1964	The Ground and Nature of the Right at 71; Our Social Inheritance at 72; working on manuscript at time of death at 81.
Jacques Maritain 1882-1973	Professor of Philosophy at Princeton from 66 to 73; Man and the State at 69; Creative Intuition in Art and Poetry at 71; La Philosophie Morale: examen historique et critique des grand systemes at 78; English Translation—The Person and the Common Good at 84.
Stephen C. Pepper 1891-	Concept and Quality at 76.

Ralph Barton Perry 1876-1957	Realms of Value at 78.
Thomas Reid 1710-1796	Essays on the Active Powers of Man at 78; Essays on the Intellectual Power of Man at 75.
Bertrand Russell 1872-1970	Nobel Prize for Literature, 1950 at 78.
George Santayana 1863-1952	Realms of Being at 77; Persons and Places at 80; Last Puritan at 72.
Ashbel Smith	Professor of Philosophy at the University of Texas for the past six years and continues in this capacity at the age of 73; published A Natural Theology for Our Time at 70; also has authored numerous articles in professional journals after passing the age of 70.
Herbert Spencer 1820-1903	Synthetic Philosophy (10 vols.) finished at 76.
James Ward 1843-1925	Essays in Philosophy at 82.
Paul Weiss 1901-	Educator and Philosopher; Philosophy in Process 6 Volumes (1968-75); Making of Men, 68; Cinematics, 73; Beyond All Appearances, 72; Sports: A Philosophical Inquiry, 71; Hofstra Distinguished Scholar Medal, 72; Fellow Ezra Stiles College; Heffer Prof. Philosophy Catholic U. of America, 1969-

XIV. Psychology

Sigmund Freud 1856-1939	Das Unbehagen an der Kultur at 74; New Series of Vorlesungen zur Einfuhrung in die Psychoanalyse at 76; Moses, Sein Volk und die Monotheistische Religion at 82.
Carl Jung 1875-1961	Appointed Professor of Medical Psychology at University of Basel at 68.

XV. Religion

Augustine 354-430	The City of God, between 59-72.
Martin Buber 1878-1965	Paths in Utopia at 69; Between Man and Man at 69; Hasidism and the Way of Man at 70; Two Types of Faith at 73; Images of Good and Evil at 74; Elija: ein myster enspiel at 85.
Paul Tillich 1886-	Professor at Harvard Univ. from 69-76; Professor at Univ. of Chicago from 76 to death at 79; 3 vols. Systematic Theology, age 65-77; The New Being at 69; The Eternal Now at 77.

XVI. Sports

George Halas 1895-	Coach of Chicago Bears until 72; President of NFC at 75; still active as Chicago Bears' Chairman of the Board at 80.
Adolph Rupp 1901-	Coach of U. of Ky. basketball until age 71; retired to become President of ABA Memphis Tams.
Casey Stengel 1889-	World championship and Manager of Year at 69; pennant winner at 71; charismatic leader of Mets until 76.

Supreme Court, U. S.
FILED
DEC 8 1975
MICHAEL RODAK, JR., CLERK

In The

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1044

COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

JOINT SUPPLEMENTAL MEMORANDUM

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Employment of Robert D. Murgia	14

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COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; ROBERT Q. CRANE, ANGELO AMATO and J. JOSEPH MALONEY, JR., as They are Members of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; JAMES W. CALLANAN, Executive Secretary of the COMMONWEALTH OF MASSACHUSETTS BOARD OF RETIREMENT; and JOHN F. KEHOE, JR., COMMISSIONER OF PUBLIC SAFETY OF THE COMMONWEALTH OF MASSACHUSETTS,

Appellants,

v.

ROBERT D. MURGIA,

Appellee.

On Appeal from the United States District Court for the District of Massachusetts

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JOINT SUPPLEMENTAL MEMORANDUM

Pursuant to Supreme Court Rule 24(5) the parties join in filing this memorandum containing data supplementing that presently available to the Court.

I. *Change In Organizational Structure of the Massachusetts State Police*

Chapter 22, Section 9P of the Massachusetts General Laws was amended by an emergency act of the Massachusetts General Court. Subsequently, Rules and Regulations were promulgated to aid in implementing the changes introduced by the amendment.

The effect of these changes is to modify the structure of the Division of State Police within the Department of Public Safety.

Pertinent portions of the Statute and Rules and Regulations governing the structure of the Division of State Police are set out below in both original and amended form to illustrate the changes which have occurred.

STATUTE

§ 9P. Division of state police; promotions; filling vacancies

Any vacancy that occurs in the grade of lieutenant colonel and executive officer of the uniformed branch of the division of state police shall be filled by the commissioner from the next two subordinate grades, and any vacancy that occurs in the grade of major and adjutant from the next subordinate grade. (Original)

§ 9P. Division of state police; office of investigation and intelligence created; bureau of investigative services; promotions; filling vacancies

Any vacancy that occurs in the grade of deputy superintendent in the division of state police shall be filled by the commissioner from the grades of lieutenant colonel or major.

Any vacancy that occurs in the grade of lieutenant colonel, other than in the office of investigation and intelligence, shall be filled by the commissioner from officers appointed to the state police under the provisions of section nine A and who hold the grade of major or captain.

There shall be created in the division of state police an office of investigation and intelligence under the direction of a lieutenant colonel who was appointed to the state police under the provisions of section six. Any vacancy which occurs in the grade of lieutenant colonel in the office of investigation and intelligence shall be filled by the commissioner from officers appointed to the state police under the provisions of section six and who hold the grade of major or captain of detectives.

Any vacancy that occurs in the grade of major, other than in the bureau of investigative services, shall be filled by the commissioner from officers appointed to the state police under the provisions of section nine A and who hold the rank of captain.

Any vacancy that occurs in the grade of major in the bureau of investigative services shall be filled by the commissioner from the grades of captain of detectives or detective lieutenant inspectors appointed to the state police under the provisions of section six. (As Amended)

RULES AND REGULATIONS

1.1 The term "Uniformed Branch" shall mean that part of the State Police established under Chapter 22, Section 9A, of the General Laws, and any amendments thereto. (Original)

1.1 The term "State Police" shall mean that Division of the Department of Public Safety established under Chapter 22, Section 9A, of the General Laws, and any amendments thereto. (As Amended)

3.1 The Uniformed Branch shall consist of the following organizational classification (sic):

Office of the Commissioner
Office of the Executive Officer
Bureau of Eastern Field Operations
Bureau of Western Field Operations
Bureau of Investigative Services
Bureau of Administrative Services
Bureau of Technical Services (Original)

3.1 The Division of State Police shall consist of the following organizational classifications:

Office of the Commissioner and Superintendent
Office of the Deputy Superintendent
Office of Field Operations
Office of Investigation and Intelligence Operations
Office of Staff Operations
Bureau of Eastern Field Services
Bureau of Western Field Services
Bureau of Investigative Services
Bureau of Administrative Services
Bureau of Technical Services (As Amended)

4.1 The order or ranks and grades of the Uniformed Branch shall be as follows:

Colonel
Lieutenant Colonel
Major
Captain
Lieutenant
Staff Sergeant
Sergeant
Corporal
Trooper
Supervisor of State Policewomen
Policewoman (Original)

4.1 The order or ranks and grades of the State Police shall be as follows:

Superintendent
Deputy Superintendent
Lieutenant Colonel
Major
Detective Captain
Captain
Detective Lieutenant
Lieutenant
Staff Sergeant
Sergeant
Corporal
Trooper (As Amended)

1.3 The term "Commissioned Officer" shall include the following ranks:

Colonel
Lieutenant Colonel
Major
Captain
Lieutenant (Original)

1.3 The term "Commissioned Officer" shall include the following ranks:

Superintendent
Deputy Superintendent
Lieutenant Colonel
Major
Detective Captain
Captain
Detective Lieutenant
Lieutenant (As Amended)

5.19 "Bureau of Investigative Services."

A commissioned officer shall be the commander of the Bureau of Investigative Services. He shall be responsible for the administration of all sections and units assigned to the Bureau and shall be accountable to the Executive Officer for all his official activities. He shall plan, direct and coordinate all criminal investigation programs and intelligence operations assigned to his command and shall coordinate the activities of the Bureau with, and lend assistance to, all law enforcement agencies of the Commonwealth or its subdivisions.

He shall have command of the following Sections within the Bureau:

Criminal Information Bureau (Section)
Special Service Section (Original)

5.20 "Bureau of Investigative Services."

A commissioned officer shall be the commander of the Bureau of Investigative Services. He shall be responsible for the administration of all sections and units assigned to the Bureau and shall be accountable to the Investigation and Intelligence Operations Officer for all his official activities. He shall plan, direct, and coordinate all criminal investigation programs and intelligence operations assigned to his command and shall coordinate the activities of the Bureau with, and lend assistance to, all law enforcement agencies of the Commonwealth or its subdivisions.

He shall have command of the following Sections within the Bureau:

Detective Section
Special Service Section
Narcotics Section (As Amended)

5.20 "Commanding Officer, Criminal Information Bureau (Section)"

A commissioned officer shall be in charge of the Criminal Information Bureau (Section). He shall be accountable to the Bureau Commander. His duties and responsibilities shall include the supervision of the following activities:

(a) Said Bureau shall collect by investigation of its own and by receipt from other law-enforcement agencies, information concerning organized crime, organized illegal gambling, and other illegal activities generally described as rackets, including information as to the identity and doings of persons who engage in, promote, operate or participate in such activities, and of persons arrested for the illegal use, sale or possession of harmful drugs or narcotics.

(b) Said Bureau shall maintain files of all such information which it collects and receives, and shall serve as a clearing house of intelligence for all law enforcement agencies within the Commonwealth concerning such activities and such persons, and may provide to and receive from similar agencies outside the Commonwealth any such information. Any police department of the Commonwealth, or any of its political subdivisions, may, by request, in the form and manner prescribed by said Bureau, receive such information as is in the files of said Bureau concerning such activities and such persons in which said police department has an official interest. The clearing house functions of this Bureau shall constitute a cooperative relationship between said Bureau, and said police departments; and if in the discretion of the head of said Bureau, responding to such request for information might interfere with an investigation being carried on by some other department or by said Bureau, he may, with the approval of the Commissioner, deny the request.

(c) Said Bureau shall from time to time advise the local police departments of new schemes or rackets which may come to its attention, and of new devices, techniques, methods of operation, and other matters of interest relating to such activities and such persons, so that the police of the Commonwealth and its political subdivisions shall be better informed and thus better able to enforce the laws with respect to such activities and such persons.

(d) The clerk of any court in which a person is convicted of a crime involving gaming of any kind, drug and narcotic violations, the sale or possession of pornographic

literature or the improper solicitation or use of funds for charitable purposes, shall forthwith report such conviction to said Bureau. The probation officer of said court shall furnish to the clerk a description of any person so convicted, which shall be on a form prescribed by the Commissioner of Public Safety.

5.21 "Commanding Officer, Detective Section."
(As Amended)

A commissioned officer shall be in charge of the Detective Section and all units assigned to his command. He shall be responsible to the Bureau Commander. His duties and responsibilities shall include:

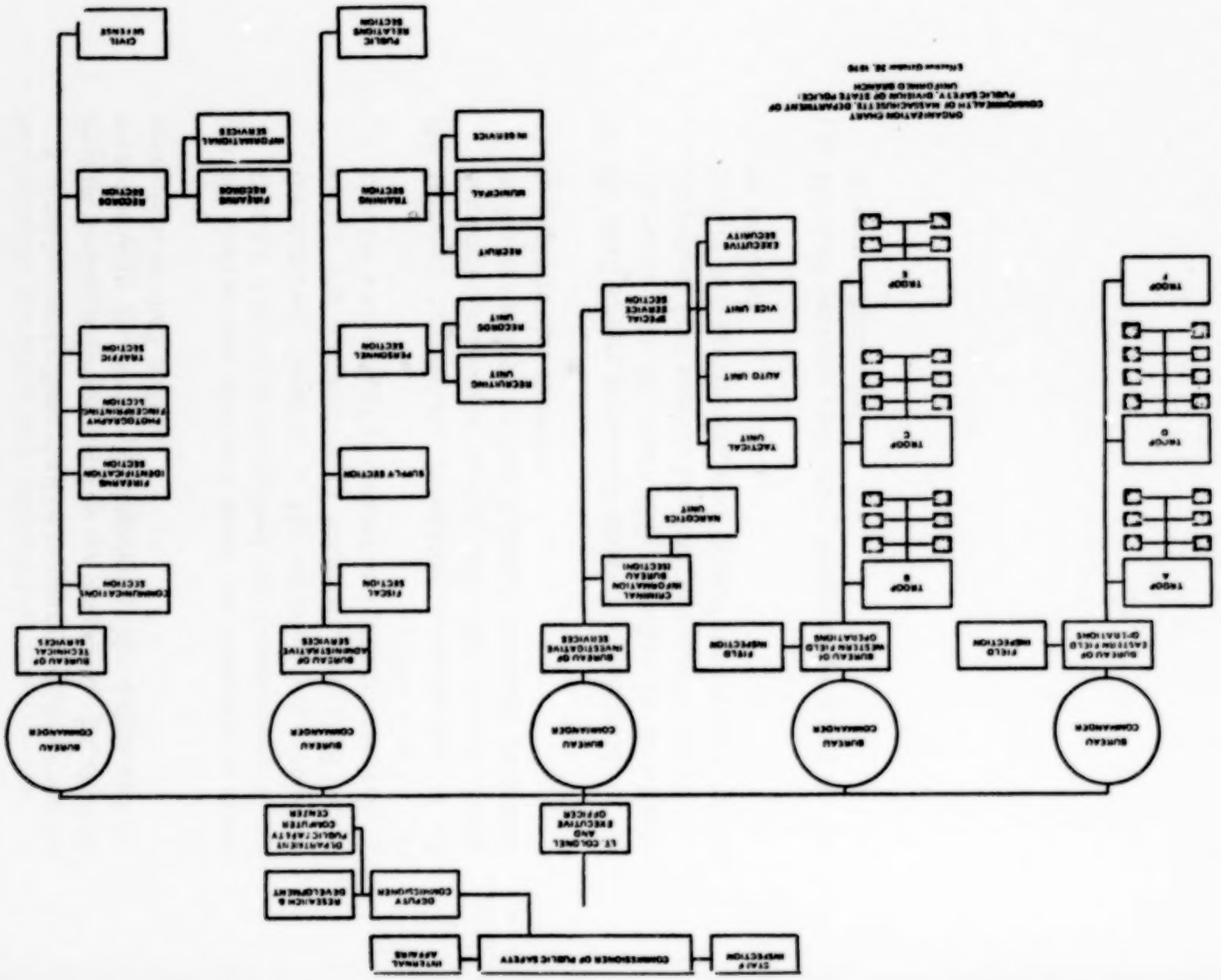
(a) He shall assign personnel under his command to assist District Attorneys throughout the Commonwealth and the Attorney General, in the investigation, detection, arrest, and prosecution of criminals, and shall supervise the activities of personnel assigned to this task.

(b) He shall initiate the immediate investigation of all homicides, suspicious deaths, and other serious crimes in Massachusetts, and shall assign adequate personnel to perform this function.

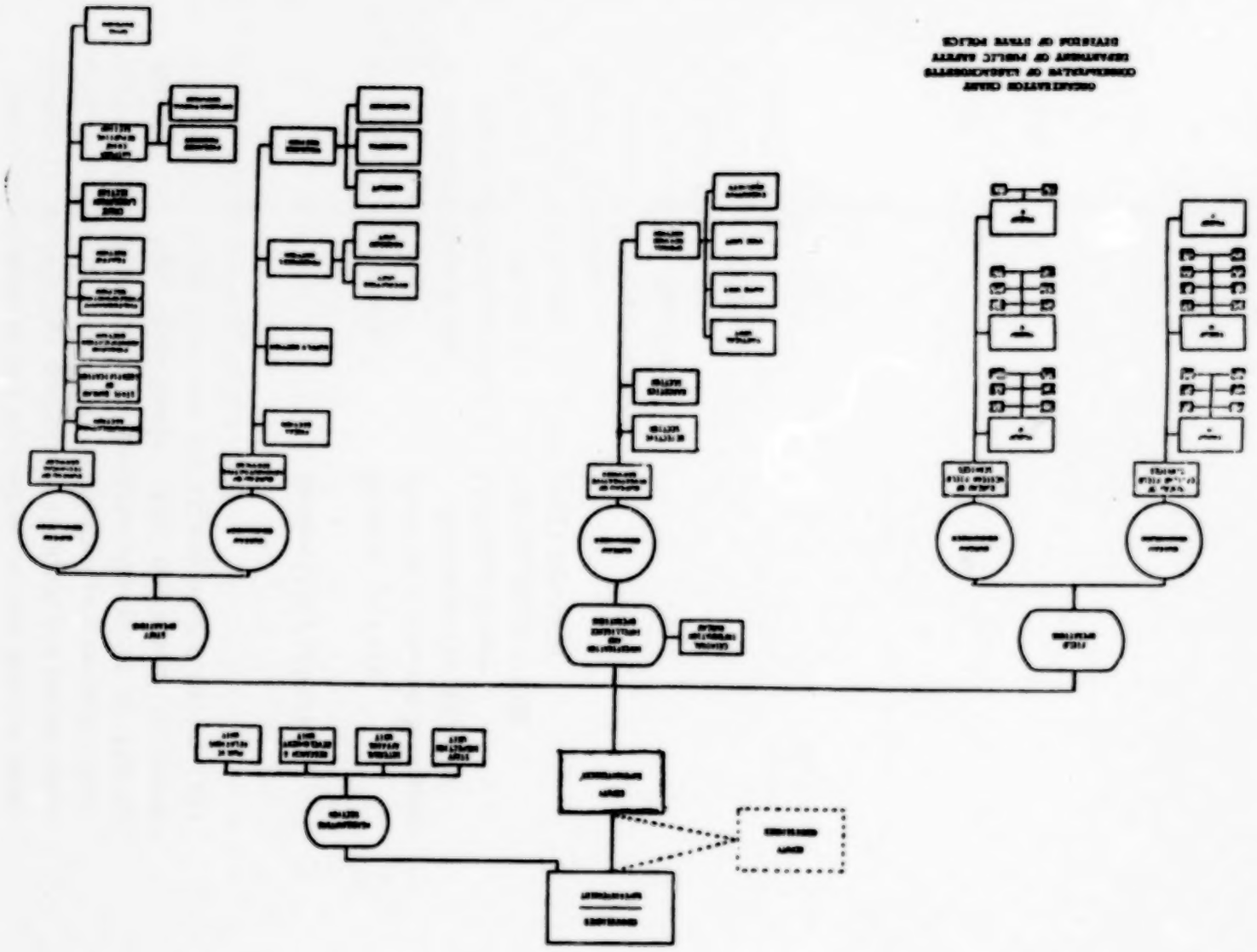
(c) He shall assign personnel under his command, in cooperation with the State Fire Marshal, to investigate suspicious fires and fire hazards, to assist in the promotion of fire prevention, and to perform related duties as required.

(d) He shall perform such other duties as required by the Bureau Commander.

(Original)



(As Amended)



II. *Employment of Robert D. Murgia*

Since the opinion of the district court was handed down Robert D. Murgia has materially changed his employment situation. Murgia is presently employed as a Security Manager in the Westminster, Massachusetts plant of Digital Equipment, Inc. He began this seventeen thousand ($17,000.00) dollar per year job supervising a twelve (12) man security force in August, 1975.

Respectfully submitted,

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